TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 939

OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., PETITIONER,

vs.

WILLIAM H. MISSEL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1942.

CERTIORARI GRANTED FEBRUARY 16, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

[fol. 2]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 901

WILLIAM H. MISSEL, Plaintiff,

vs.

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Defendant

COMPLAINT—Filed October 29, 1940

I

William H. Missel, a resident of the City of Baltimore, State of Maryland, brings this action to recover from the Defendant, The Overnight Motor Transportation Co., Inc., unpaid overtime compensation, in an amount hereinafter set forth and an additional equal amount as liquidated damages, pursuant to Section 16 (B) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chapter 676, 52 Stat.; U. S. C., Title 29, Section 201 et seq.), hereinafter called the Act.

II

The jurisdiction of this action is conferred upon the Court by Section 41, subsections 1 and 8 of the Judicial Code, Title 28 U. S. C. A., Section 41, subsections 1 and 8 (giving the Federal District Courts jurisdiction of all suits under laws regulating interstate commerce, regardless of the citizenship of the parties or the sum or value in controversy) and Section 16 (B) of the Fair Labor Standards Act of 1938.

III

Defendant is a corporation of the State of Maryland, [fol. 3] and at all times hereinafter mentioned was and now is within the jurisdiction of this Court. Defendant is engaged in the business of motor transportation of freight as a common carrier, operating and carrying on such business from within the State of Maryland into and through

other States, and from and through other States into and through the State of Maryland. The Defendant is licensed and authorized to operate in interstate commerce by the Interstate Commerce Commission and displays on its motor trucks the usual Interstate Commerce Commission's license plates.

IV

Plaintiff was in the employ of Defendant corporation from the time of its incorporation, May 22, 1939, down to and including October 19, 1940; prior to May 22, 1939, Plaintiff was in the employ of Louis Oberfeld and Oscar Oberfeld, trading as Overnight Transportation Company, which company was engaged in a like type of interstate commerce, from and including October 24, 1938, down to and including May 22, 1939. Plaintiff understands and believes, and therefore avers, that the Overnight Transportation Company, Inc., when incorporated took over the assets and liabilites of Louis Oberfeld and Oscar Oberfeld, trading as the Overnight Transportation Company. Plaintiff's employment, therefore, has been continuous with the said Motor Transportation Company from October 24, 1938, down to and including October 19, 1940.

From and including October 24, 1938, to October 19, 1940, inclusive, Plaintiff was employed as a clerk by the Defendant, his particular duty being to classify the business offered to and handled by the Defendant under the applicable schedules of rates. All of the duties performed by Plaintiff for the Defendant were, "in commerce".

V

(A) During the period October 24, 1938, to October 23, 1939, inclusive (for which period the Act establishes a [fol. 4] maximum workweek of 44 hours for an employee, unless such employee receives compensation for his employment in excess of the said 44 hours each workweek, at a rate not less than one and one-half times the regular rate at which he is employed), Plaintiff worked divers workweeks longer than 44 hours and for such hours so worked in excess of the 44 hour workweek, he was not paid by Defendant at the rate of one and one-half times the regular rate at which he was so employed.

(B) During the period October 24, 1939, to October 23, 1940, the Act establishes a maximum workweek of 42 hours

for an employee, unless such employee receives compensation for his employment in excess of the said 42 hours each workweek at a rate not less than one and one-half times the regular rate at which he is employed. During the period October 24, 1939, to October 19, 1940, inclusive, Plaintiff worked divers workweeks longer than 42 hours and for such hours so worked in excess of the 42 hour workweek he was not paid by the Defendant at the rate of one and one-half times the regular rate at which he was so employed.

(C) Plaintiff sets out in Exhibit "A", attached hereto and made a part hereof, such partial record as he has in his possession of hours worked by him, in workweeks in the periods set forth in paragraphs (A) and (B) next above, in excess of the legal maxima, together with his regular rate of pay and amount of unpaid compensation due him for such workweeks; but such unpaid compensation Plaintiff claims is only a portion of what is due him and the exact amount may only be ascertained and discovered from Defendant's records, to which Plaintiff does not have access, which records (as required by Section 11 (C) of the Act) should disclose the complete details of Plaintiff's employment by Defendant, including the type of work, location of work, number of hours worked in each workweek, hours [fol. 5] worked in excess of the statutory number for each workweek, and compensation earned for hours worked in excess of the statutory number for each workweek.

VI

Wherefore Plaintiff demands:

1. That judgment be awarded him, William H. Missel, in the amount found to be due him by this Honorable Court, for unpaid overtime compensation and for an additional equal amount as liquidated damages as provided by the Act.

2. That judgment be awarded the Plaintiff, William H. Missel, in this action for a reasonable attorneys' fee to be paid by the Defendant to Plaintiff's counsel, as provided by the Act.

3. That judgment be given by the Court to the Plaintiff against the Defendant for the costs of this action, as provided by the Act.

4. That the Court may grant to the Plaintiff such other and further relief as the court may deem proper.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

[fol. 6] EXHIBIT "A" TO COMPLAINT

[Title omitted]

Work Week Ending	Hours Worked	Excess Hours Over 44	Average regular rate of pay per hour	Overtime compensation due
9-15-39	77	33	.56818	
9-29-39	79	35	"	
10- 6-39	80	36	"	
10-13-39	73	29	"	
10-20-39	76	32	"	
Total Excess Hours...		165	.56818	165 hrs. @ .85227 $140.62
		Excess Hours Over 42		
10-27-39	80	38	.595238	
11-24-39	62	20	"	
12- 1-39	60	18	"	
12- 8-39	63	21	"	
12-15-39	72	28	"	
12-22-39	60	18	"	
12-29-39	60	18	"	
1- 4-40	77	35	"	
1-12-40	67	25	"	
1-26-40	79	37	"	
2- 2-40	69	27	"	
2- 9-40	54	12	"	
2-23-40	61	19	"	
3-22-40	61	19	"	
3-29-40	53	11	"	
4- 5-40	62	20	"	
[fol. 7]				
4-12-40	50	8	.595238	
4-26-40	65	23	"	
5- 3-40	69	27	"	
5-10-40	62	20	"	
5-17-40	64	22	"	
5-24-40	52	10	"	
5-31-40	64	22	"	
6- 7-40	62	20	"	
6-14-40	44	2	"	
Total Excess Hours...		520	.595238	520 hrs. @ .89285 $464.28

Plaintiff was not paid any compensation for excess hours worked. This exhibit sets out the unpaid overtime compensation due him at the rate of one and one-half times the regular rate at which he was employed. The regular rate

of employment is ascertained by dividing the weekly compensation by the statutory maximum workweek hours for the respective periods.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed November 19, 1940

The Defendant, by John R. Norris, its Attorney, moves the Court to dismiss the Bill of Complaint because it fails to state a claim against the Defendant upon which relief can be granted.

John R. Norris, Attorney for Defendant.

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil No. 901

WILLIAM H. MISSEL, Plaintiff,

vs.

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Defendant

OPINION OF THE COURT ON MOTION TO DISMISS—Filed February 20, 1941

COLEMAN, District Judge:

This case, which arises under the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201-219), and involves also the Motor Carrier Act, 1935, (49 U. S. C. A. Secs. 301-327), is before the court on a motion of the defendant to dismiss the bill of complaint on the ground that it fails to state a claim against the defendant upon which relief can be granted.

The bill of complaint discloses that the defendant is a common carrier of freight in interstate commerce by motor vehicle, and that plaintiff was employed by the defendant or its predecessor (whose assets and liabilities the defendant assumed) as a rate clerk from October 24th, 1938, to

October 19th, 1940, and that during this period he worked certain hours in excess of the maximum work-week stipulated by the Fair Labor Standards Act of 1938, and that for such overtime, defendant did not pay him at the rate of one and a half times the regular rate at which he was employed, as required by this Act. Accordingly, the plaintiff brought suit under Section 16 (b) of this Act (29 U. S. C. A. Sec. 216 (b)), and has asked for the relief provided in that section, which reads as follows: "Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected [fol. 10] in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

It is clear that this court is one "of competent jurisdiction" to entertain the present suit by virtue of Section 24, Paragraph 8 of the Judicial Code (28 U. S. C. A. Sec. 41 (8)) which gives to the district courts original jurisdiction "Of all suits and proceedings arising under any law regulating commerce." The basis for the legislation enacted in the Fair Labor Standards Act is the power of Congress to regulate interstate commerce. The defendant is subject to the provisions of the Motor Carrier Act, 1935 (49 U. S. C. A. Sec. 301-327), as amended by the Transportation Act of 1940, Sections 15 to 27, inclusive, approved September 18th, 1940. It thus follows that this court has jurisdiction regardless of the amount in controversy or the citizenship of the parties.

The basis of defendant's motion to dismiss the bill of complaint is Section 13 (b) (1) of the Fair Labor Standards Act of 1938 which provides as follows, (29 U. S. C. A. Sec. 213 (b)): "The provisions of section 207 (fixing maximum hours of work) shall not apply with respect to (1) any employee with respect to whom the Interstate Com-

merce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; * * *." 49 U. S. C. A. Sec. 304 (a) (1) and (2) provides as follows: "Powers and duties generally. It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and [fol. 11] reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

In interpreting these two inter-related statutory provisions, the Supreme Court, in United States v. American Trucking Associations, Inc., 310 U. S. 534, has declared that the power of the Interstate Commerce Commission under section 204 (a) (1) and (2) of the Motor Carrier Act, 1935, above quoted, to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, is "limited to those employees whose activities affect the safety of operation". The Supreme Court did not, however, in this decision attempt to be more specific, or to name precisely what employees fall within this definition. Defendant contends that since the Commission, up to the present time, has issued no regulations with respect to employees falling under the Motor Carrier Act except drivers of motor vehicles, the district courts are without jurisdiction to entertain a suit of this kind; that is to say, that whether a particular employee falls within the excepted class, namely, is one "whose activities affect the safety of operation" is a question of fact which must first be determined by the Commission, and that until such determination is made, it must be assumed that the plaintiff's hours of work are subject exclusively to the jurisdiction of the Commission and, therefore, fall within the exception of the Fair Labor Standards Act, above

quoted. Defendant asserts that if this court fails to place the plaintiff in the class exempted from the operation of the Fair Labor Standards Act, and holds that he is entitled to back pay for overtime in accordance with the requirements of that Act, motor carriers throughout the country will be subjected to unexpected and unwarranted payroll expenses, directly contrary to the underlying purpose of the Motor Carrier Act. Defendant invokes the doctrine laid down in [fol. 12] Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, to the effect that before a court may pass upon the reasonableness of interstate rates established by a carrier, there must first be a ruling by the Commission as to their reasonableness.

With this contention of the defendant we cannot agree. We do not consider that the principle laid down in the Abilene case, supra, is applicable to the situation before us. It is true that the precise question here presented was not adjudicated in United States v. American Trucking Associations, Inc., supra. There, the only question presented and decided was as to the power of the Interstate Commerce Commission under the Motor Carrier Act, 1935, to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, other than employees "whose activities affect the safety of operation." The suit was originally brought against the United States and the Commission by the Trucking Associations and certain motor carriers. Shortly after the passage of the Motor Carrier Act in 1935, the Interstate Commerce Commission, on its own motion, proceeded to fix maximum hours of service for "employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." Ex parte No. MC-2, 3 M. C. C. 665, 667. Shortly thereafter the Fair Labor Standards Act of 1938 was enacted containing the provisions above quoted exempting from its terms "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" pursuant to the provisions of the Motor Carrier Act. Since this exemption directly raised the question as to the extent of the Commission's power or coverage of employees under the Motor Carrier Act, the Commission again examined the scope of its jurisdiction and in Ex parte MC-28, 13 M. C. C. 481, 489 again reached the conclusion that its powers under "section 204 (a) (1) and (2) is limited

to prescribing qualifications and maximum hours of service for those employees * * * whose activities affect the safety of operation." The Wage and Hour Division of the Department of Labor arrived at the same result. Interpretative Bulletin No. 9, Wage & Hour Manual (1940) 168.

Thereupon the American Trucking Associations and [fol. 13]. others petitioned the Commission to disregard its report and order in Ex parte MC-28, but the Commission reaffirmed its original position, whereupon a three judge district court was petitioned to require the Commission to take jurisdiction and consider the establishment of qualifications and hours of service of all employees of common and contract carriers by motor vehicle. This court reversed the Commission, set aside its order and directed it to take jurisdiction of the appellees' petition. 31 F. Supp. 35. From this action of the lower court a direct appeal to the Supreme Court was granted, resulting in the opinion already summarized. The supreme Court was divided, five to four, in this decision. The lower court had also been divided.

Although an explanation has already been given of what led up to the decision of the Supreme Court in the American Trucking Associations, Inc. case, supra, it is appropriate to give the following complete chronology of events to the present time: (1) December 29, 1937, report and order of Interstate Commerce Commission in Ex parte No. MC-2, prescribing maximum hours of service for drivers only, of common and contract carriers by motor vehicle, 3 M. C. C. 665. (2) June 25, 1938, Fair Labor Standards Act of 1938 passed, 29 U. S. C. A. 201-219. (3) March 25, 1939, the Wage and Hour Division, Department of Labor, issued Interpretative Bulletin #9 ruling that all employees of common and contract carriers by motor vehicle other than drivers, are subject to the Fair Labor Standards Act with respect to hours, unless and until an order of the Commission determines to the contrary, Wage and Hour Manual (1940) 168. (4) May 1, 1939, the Interstate Commerce Commission ruled in Ex parte MC-28 that it was without power to prescribe qualifications and maximum hours of service for any employees of common and contract carriers by motor vehicle other than those whose activities affect the safety of operation, 13 M. C. C. 48. (5) May 16, 1939, the Interstate Commerce Commission in its ruling No. 79 confirmed the ruling of the Wage and Hour Division in its Interpretative Bulletin No. 9 of March 25, 1939. (6) May 1,

1940, the Interstate Commerce Commission in Ex parte MC-3 ruled that the same regulations prescribed by it for drivers of common and contract carriers by motor vehicle in Ex parte MC-2, shall apply to drivers employed by private carriers by motor vehicle. (7) May 27, 1940, deci-[fol. 14] sion of the Supreme Court in the American Trucking Associations Inc., supra. (8) June 15, 1940, the Interstate Commerce Commission ordered a reopening, upon the request of the motor carrier industry, of Ex parte MC-2 and MC-3 in the light of the Supreme Court's decision. As yet no further order of the Commission has been passed.

At the outset it is to be noted (1) that the exemption clause in Section 13 (b) (1) of the Fair Labor Standards Act embraces only those employees with respect to whom the Interstate Commerce Commission *"has power"* to establish requirements as to qualifications and maximum hours of service; and (2) the Supreme Court has limited such *"power"* to those employees "whose activities affect the safety of operation." It will thus be seen that the basic question upon which a correct decision of the controversy in the present case hinges, is a question quite unlike that presented in the Abilene Cotton Oil Co. case, supra, where the "power" of the Interstate Commerce Commission was conceded, namely, the power to determine the reasonableness of rates. In that case, it was held that when a power is thus given by statute and also the means of executing it are provided, such power can be executed in no other way than that prescribed by the statute. As was said in a later case, Great Northern Rwy. Co. v. Merchants Elevator Co., 259 U. S. 285, 291: "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is

essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission."

It is true, as was said recently in Armour & Company v. [fol. 15] Alton R. R. Co., 111 Fed. (2d) 913, 918 "The Abilene doctrine, the doctrine of primary jurisdiction, is still more easily stated than applied." But the question now before this court is on principle essentially as much a question of law as was the question decided by the Supreme Court in the American Trucking Associations, Inc., supra. There the question was "what power had Congress granted the Interstate Commerce Commission by Section 204 (a) of the Motor Carrier Act"? The court held (pages 546, 547) that Congress had granted no more "than the customary power to secure safety in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual power over all employees." The court explained that the settled policy of Congress had been consistent in its limitation to legislation with respect to regulation of transportation employees in matters of movement and safety only. It said (pages 545, 547, 549): "The Hours of Service Act imposes restrictions on the hours of labor of employees 'actually engaged in or connected with the movement of any train.' The Seamen's Act limits employee regulations under it to members of ships' crews. The Civil Aeronautics Authority has authority over hours of service of employees 'in the interest of safety.' It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act 'forty states had regulatory measures relating to the hours of service of employees' and every one 'applied exclusively to drivers or helpers on the vehicles.' * * * The committee reports and the debates contain no indication that a regulation of the qualifications and hours of service of all employees was contemplated; in fact the evidence points the other way.

* * * * * * *

"The Commission and the Wage and Hour Division, as we have said, have both interpreted section 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight."

The aforegoing being true, it is erroneous to say that, in a suit of this kind, the courts may not determine in advance of a ruling by the Interstate Commerce Commission whether a certain type of employee does or does not fall within the [fol. 16] limits of the classification fixed by the Supreme Court. It is to be noted that the exemption is limited to those employees whose "activities affect the safety of *operation.*" The Supreme Court in American Trucking Associations, Inc., thus concluded its opinion, page 553: "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in section 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others." The Commission had declined, for want of jurisdiction as it believed, to determine the qualifications and maximum hours of service for any other class of employees. In this position it was upheld by the Supreme Court. In so doing the Supreme Court has definitely indicated who is an employee "whose activities affect the safety of operation." It is said in effect that to meet this definition his activities must relate to the operation or movement of the means of transportation involved. We do not mean to say that the limitations imposed by the Supreme Court necessarily exclude all but drivers or helpers on motor vehicles merely because at the time of the Supreme Court's decision there was no precedent for enlarging the class. But we do say that there is nothing in the Supreme Court's decision that is in the least indicative of the existence of power in the Commission to say that an employee's "activities affect the safety of operation" when such activities as those of the plaintiff in the present case have only a most remote relation to the actual *movement* of motor vehicles falling under the jurisdiction of the Act. Plaintiff is a rate clerk. His duties are clerical and have no direct relation to operation, other than through the tenuous argument that since motor vehicles cannot lawfully transport goods in interstate commerce until the rates or charges for so doing have been duly established and exacted, the rate clerk, therefore, performs duties relating to operation, because there can be no operation without rates. By the same argument, almost anyone employed by a motor carrier could be said to be engaged in activities related to operation,—one who types or signs a letter relating to safety

measures, or prepares or signs an accident report; even the messenger boy to whom such papers are entrusted, or indeed even the janitor or scrub woman, because these make it possible for others to occupy their offices satis- [fol. 17] factorily and to write and transmit letters or reports.

In addition to the reasons just mentioned, there is something else which is at least very persuasive. It is this: As already shown, after the Wage and Hour Division of the Department of Labor, on March 25th, 1939, ruled that all employees of common and contract carriers by motor vehicle, other than drivers, would be subject to the Fair Labor Standards Act with respect to hours, unless and until an order of the Commission determined to the contrary, the Commission itself formally confirmed this ruling on May 16th, 1939, (Ruling No. 79). Such action is entitled to great weight. It indicates that the Commission must at least have entertained some doubt as to its power to include, within its ruling, even loaders and helpers. A fortiori, this weakens any argument based upon the assumption that the Commission has power, though unexercised, over employees completely removed from the functions of operation.

The conclusion here reached is in no sense weakened by the fact, already noted, that the Commission has reopened and still has under advisement, the question as to whether *any* employees other than drivers of motor vehicles should be declared to be subject to the Commission's regulations. It may well be that the Commission may decide that certain other types of employees, such as loaders or even helpers if engaged in operative functions, should be brought under its jurisdiction, and such would be an exercise of granted power. In the Abilene and like decisions, the question was not, as here, whether *power* existed in the Commission. Such was conceded. The question there was as to the *exercise* of the power. Suppose the Commission should ultimately decide that the activities of rate clerks and of all other clerical workers employed by motor carriers subject to the Act do affect the safety of operation. We must assume that such would be contrary to the Supreme Court's ruling, because, as we conclude, the Commission has no *power* as a result of what the Supreme Court has decided, to establish regulations with respect to such persons. To be sure, after the Commission has fixed a rate

or classification pursuant to the Abilene doctrine, courts may strike it down as unreasonable or discriminatory. But in such case, the primary jurisdiction,—the *power*,—to fix *some* rate or classification would be conceded; whereas in [fol. 18] the other case supposed, jurisdiction would have been asserted with respect to persons over whom there never was any *power*. In the one case, it would be abuse of granted power; in the other, exercise of power never, in fact, granted at all.

Finally, we are not unmindful of the fact that our present ruling may have the result of imposing unexpected additional expense upon motor carriers, and also, that since courts have power to determine when "safety of operation" is, in fact, affected, there may be a variation from time to time in the different decisions upon this point.

Indeed the lower court in its opinion, and the minority Justices of the Supreme Court by their adoption of the reasons in that opinion, in the American Trucking Associations case, supra, were firmly of the view that stabilization of labor conditions as applied to the motor carrier industry was necessary, and that it was not unreasonable to assume that Congress, aware of the problem and of the need for uniformity, chose to place upon the Commission full power to solve the problem. But a majority of the Supreme Court has decided otherwise, and once it be clear as we are satisfied it is, that a determination of whether the *power* is actually possessed by the Commission, is essentially a judicial function, the present plaintiff, and others in a like situation, are entitled to have their status under these statutes promptly and definitely determined. Under defendant's theory, the power of the courts to do this may be indefinitely suspended, which means a suspension of the operation of both statutes with respect to such rights as employees, like the plaintiff, may have under them.

If it be said that the plaintiff should first petition the Commission and obtain its ruling, as the association of truckmen and various common carriers did in the proceedings which led up to the decision of the Supreme Court in the American Trucking Associations case, supra, suffice it to point out that the plaintiff's position is opposite to that of those petitioners. He does not want the Commission to do anything. His suit is not brought under the Motor Carrier Act, but under the Fair Labor Standards Act. Both of these statutes have been upheld by the Supreme Court.

See Maurer v. Hamilton, 309 U. S. 598; Darby Lumber Co. v. United States, and Opp Cotton Mills v. Administrator of Wage, etc., decided February 3rd, 1941. In the case first mentioned, the Commission had made no regulation con-
[fol. 19] cerning sizes and weights of motor vehicles or their loads. Nevertheless, the Supreme Court, in a suit which originated in a State Court to enjoin the enforcement of a State statute, held that the Commission had no regulatory power in this particular field, under Section 204 of the Motor Carrier Act which we have been considering. The analogy is clear and supports the conclusion we have reached in the present case.

For the reasons given, defendant's motion to dismiss the bill of complaint must be overruled.

William C. Coleman.

[fol. 20] In United States District Court

[Title omitted]

Answer—Filed March 17, 1941

The Answer of Overnight Motor Transportation Company, Inc., by John R. Norris and J. Ninian Beall, its attorneys, to the Bill of Complaint filed against it in the above proceedings, respectfully represents that:

I

It admits the allegations contained in Section I but denies that Plaintiff is entitled to recover.

II

It admits all of the allegations contained in Sections II and III thereof.

III

It admits the allegations contained in Section IV except insofar as Plaintiff asserts that he was employed as a clerk by the Defendant, his particular duty being to classify the business offered to and handled by the Defendant under the applicable schedules of rates, which assertion Defendant denies.

IV

It denies all of the allegations contained in Sections V (A), V (B) and V (C) thereof; and also the contents of Exhibit A referred to in Section V (C) and appended to the said Bill of Complaint.

[fol. 21] V

It denies that the Bill of Complaint states a claim against the Defendant upon which relief can be granted.

Wherefore, having fully answered said Bill of Complaint, Defendant prays that the same be dismissed with its proper costs.

John O. Norris, Fidelity Bldg., Baltimore, Md. J. Ninian Beall, 1013 16th St., N. W., Washington, D. C.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF AMERICAN TRUCKING ASSOCIATIONS, INC., TO INTERVENE AS "AMICUS CURIAE" AND ORDER OF COURT GRANTING MOTION—Filed April 22, 1941

American Trucking Associations, Inc., moves for leave to intervene as Amicus Curiae in this action, in order to assert the defenses to be set forth in a brief to be filed with this Honorable Court prior to the trial of said cause, the ground for said intervention being that the American Trucking Associations, Inc., is the national trade association of the trucking industry the members of which are vitally affected by the issues involved in said cause in which the decision will establish an important precedent.

And Whereas, it is the duty of the applicant for intervention to protect the interests of its members in litigation matters of national importance in which precedents may be established, and said Association has heretofore been the active party in all prior proceedings before the Congressional Committees, Interstate Commerce Commission, United States District Court (31 Federal Supplement 35) and United States Supreme Court (310 U. S. 534; rehearing denied 61 S. Ct. 53).

Now, Therefore, comes the applicant for intervention and prays this Honorable Court to grant its motion for leave to intervene as "Amicus Curiae" to present both questions of law and of fact which are common to the main action.

J. Ninian Beall, Attorney for American Trucking Associations, Inc., 1424—16th St. N. W. Washington, D. C. John R. Norris, 1513 Fidelity Building, Baltimore, Md.

[fol. 23] ORDER

Whereas it appears that the American Trucking Associations, Inc., is a party having a common interest in the proceedings in the case of William H. Missel vs. The Overnight Motor Transportation Company, Inc., a body corporate, Civil Action No. 901.

And Whereas said American Trucking Associations, Inc., desires to intervene as "amicus curiae" in said case.

It is Ordered this 22nd day of April, 1941, by the U. S. District Court for the District of Maryland that, said American Trucking Associations, Inc., is hereby given leave to intervene as "Amicus Curiae" in this action.

William C. Coleman, U. S. District Judge.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATIONS OF FACTS—Filed April 22, 1941

1. All duties performed by Plaintiff for Defendant were "in commerce".

2. Both parties admit jurisdiction of the Court over themselves and the subject matter.

3. Both parties admit that Defendant is licensed to engage in and does operate in interstate commerce.

4. William H. Missel, Plaintiff, employed by Overnight Motor Transportation Company, Inc., Defendant, performed duties of the following nature:

(a) Applied proper rates to various classifications of freight.

(b) Received collections of freight revenue from drivers and accounted for same to company auditor.

(c) Disbursed from company funds to employees, includ-

ing drivers, for road men's travel advance; also, disbursed therefrom miscellaneous amounts on approved vouchers.

(d) In absence of chief dispatcher would dispatch trucks.

(e) None of the duties performed by Plaintiff were those of a driver, driver's-helper, loader, or mechanic as defined by the Interstate Commerce Commission in its decision of March 4, 1941 in Ex Parte MC-2 and MC-3.

[fol. 25] 5. That Plaintiff commenced to work for Defendant on November 26, 1937 at a salary of $23.00 per week, plus supper money of $2.50 per week, or a total of $25.50 per week; and on November 1, 1938 his salary was increased to $25.00 per week, plus supper money of $2.50 per week, or a total of $27.50 per week; that he worked a varying number of hours per work-week from the time of commencement of employment until termination on October 19, 1940; that the work-week ended on Thursday.

6. That Plaintiff was paid his weekly salary regardless of absent time.

7. *Longest Number of Hours In Any One Work-Week.* That in at least each of two of the said work-weeks during the period October 24, 1938-October 23, 1939, Plaintiff was on duty a maximum total of 80 hours; that in at least each of three of the said work-weeks during the period October 23, 1939-October 19, 1940, Plaintiff was on duty a maximum total of 75 hours.

John R. Norris, Clayton W. Daneker, Attorneys for Plaintiff. J. Ninian Beall, William O. Tydings, George A. Mahone, Attorneys for Defendant, Per W. L. Ritchey.

[fol. 26] In United States District Court

[Title omitted]

Plaintiff's Motion for Leave to Amend Bill of Complaint and Order of Court Granting Motion—Filed April 24, 1941

Comes now the Plaintiff, by his Attorneys, and respectfully moves for Permission of the Court to Amend the Bill of Complaint, heretofore filed in this cause, by supplementing said Bill of Complaint to show an alternative method of determining the "regular rate at which he is employed" (or was employed), (Section 7 (a) (3) Fair Labor Stand-

ards Act of 1938), and to show by reason of such alternative method an alternative claim or claims for unpaid overtime compensation, to wit:

By adding a paragraph to follow V (C) on page four of the Bill of Complaint, to be shown as (D) and reading,

(D) Or in the alternative, if the regular rate at which he was so employed should be held Not to be a rate arrived at by dividing his weekly salary by the maximum number of hours in the respective statutory workweeks, then and in that event Plaintiff claims the regular rate at which he was so employed should be determined by dividing his weekly salary by the number of hours found by the Court to have been worked per workweek by Plaintiff; and, therefore, under this alternative claim the total amount due Plaintiff for unpaid overtime compensation will be a matter of computation based upon the findings of the Court.

[fol. 27] Wherefore, your Petitioner prays that an Order may be passed authorizing the aforegoing Amendments to the Bill of Complaint.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

ORDER

Ordered, this 24th day of April, 1941, by the District Court of the United States, for the District of Maryland, that leave be and it is hereby granted Petitioner to amend the Bill as prayed, and that the Bill stands as amended by the additions thereto set out in the aforegoing petition inserted at the paragraph specified therein.

William C. Coleman, United States District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Title omitted]

EXTRACT OF PROCEEDINGS BEFORE THE COURT ON APRIL 24, 1941

Baltimore, Maryland, April 24, 1941.

Before His Honor Judge William C. Coleman

APPEARANCES:

Messrs. George A. Mahone and William O. Tydings, appearing on behalf of plaintiff.

Messrs. John R. Norris, J. Ninian Beall and Clayton W. Daneker, appearing on behalf of defendant.

(Extract from discussion)

The Court: Let us see if I get the figures right, because I have not carried them in my mind from the pre-trial conference. This plaintiff was employed at a weekly rate of $27.50 a week; is that correct?

Mr. Mahone: For a short period after the Act went into effect he was employed at $23 per week, as the stipulations show, plus supper money of $2.50 a week which counsel on the other side regard as part of his salary, I understand. I don't know whether they do or not. Then on November 1, 1938, he got a salary of $25 a week plus supper money of $2.50 a week.

The Court: That is what he was getting when the Act went into effect?

Mr. Mahone: He was getting $23. The Act went into effect October 24, 1938.

The Court: There ought not to be any dispute now as to what he is getting.

[fol. 29] Mr. Mahone: There is no dispute as to what his salary was. It was stipulated in order to eliminate the necessity of making any proof on it. The only thing to determine here by the Court, as I see it, is what was his rate of pay?

The Court: I want to know what his regular rate of pay was under his contract. Is not that stipulated?

Mr. Mahone: His regular rate of pay was $25 a week.

The Court: You said $23 a moment ago.

Mr. Mahone: I did. He was employed to come to work at $23 a week and he accepted it. That was the contract. That was for 1937, November. Then the Act went into effect October 24, 1938. On November 1, 1938, the weekly salary was increased to $25 per week.

The Court: Are we concerned here with $25 or $23?

Mr. Mahone: I would say with the $25.

The Court: In addition to that he got $2.50?

Mr. Mahone: Yes.

The Court: During the period that is involved?

Mr. Mahone: That was for supper money and not for compensation, it was not his salary.

Mr. Mahone: The Plaintiff's rate of pay is to be determined by the number of hours worked divided into his wages or salary, as the case may be. I want to develop the fact it would be necessary here to put the plaintiff on the stand in the absence of any complete record by the defendant. I think they will admit they have no record except from June, 1940.

Mr. Norris: June 14, 1940.

Mr. Mahone: That is when they first began to keep records. The plaintiff has some time cards which he [fol. 30] punched himself, very fragmentary. He states they are only part, but the only record he has.

The Court: I thought the pre-trial conference and stipulation did away with any testimony about what the man was getting.

Mr. Mahone: We agree he was getting $25 a week, but we do not agree the court's method of determining the rate of pay is correct, basing it on the minimum.

The Court: That is a legal question.

As I understand this case, the object of the plaintiff now —I don't recall the exact figures, but the object of the plaintiff is to require the defendant to pay him about twice the salary that they contracted to pay him as the result of this Act. That is the sum and substance of it as developed in the pre-trial conference. He was getting some $1200 a year.

Mr. Mahone: I have forgotten the exact amount.

Mr. Norris: $1,420.

The Court: And the effort is now to prove that he is entitled to, I think, over twice that amount?

Mr. Norris: $3,500 additional account of the double penalty claim that has been made.

Mr. Mahone: It is around $1,700.

The Court: I am still not satisfied that you have shown me that any further testimony should be taken. . . . Is there any dispute as to what he did get?

Mr. Mahone: There is no dispute he got $25 a week. But your Honor is not going to foreclose the plaintiff here showing that under the Act he was not paid what he was entitled to. He was entitled to more than $25 a week.

The Court: That is not a matter for the plaintiff to say on the witness stand. That is a question of computation from the language of the Act.

[fol. 31] Mr. Mahone: Precisely. But unless you put the witness on the stand you have no average number of hours. In the exhibit there are, I think, thirty weeks he was able to keep a record, and if you add the hours and average it at 30, it shows an average of 65 hours a week.

The Court: Mr. Norris, what is your attitude?

Mr. Norris: It was my understanding that at the pre-trial conference the stipulation of fact that has been filed in the case covered every issue; that in your Honor's opinion the law was a minimum wage act, and that there was no problem of averaging hours or of determining a rate for the particular week within which the plaintiff worked, because in the most extreme case where the plaintiff did 80 hours of work in one week taking the statutory rate of pay which your Honor determined was the proper method, that still only gives an earning for that week under the minimum wage law of $24.50, and he was paid $25. Therefore, under the minimum wage act it has been satisfied.

It is very clear that in the first year of the Act the plaintiff worked two weeks in which he was on duty a great number of hours, eighty hours. And in the second year of the Act there were three weeks in which he spent as much as 75 hours a week. There was obviously no week in which he spent more than 80 hours or 75 hours respectively on duty in any of that period. Even in the week where he did work 80 hours and the Minimum Wage Act requires he be paid 25 cents an hour for the first 44 hours and 32½ cents an hour for the remaining 36 hours, an arithmetical calculation shows a total sum of $24.50 which he should receive, and he received $25 for that week plus supper money of $2.50.

. . . . . .

The Court: Now, let us suppose—I am not asking you to accept it as true, but just as a test—suppose it could [fol. 32] be shown that the plaintiff worked on an average, we will say, to make it shorter, during both the first and second year period, worked on an average 65 hours.

Mr. Norris: Just looking at the Bill of Complaint will show how difficult it is for any one to testify as to the average.

The Court: I understand that. But let us take that as a typical case, and take it for the first year, 65 hours and

subtract 44 from it; that would be an excess of 21 hours, would it not?

Mr. Norris: Yes, sir.

The Court: Now worked out on the other theory what would it be, on the liberal theory, 1½ times the regular rate at which he is employed?

Mr. Mahone: On our theory that would make 42 cents an hour—65 into $27.50.

The Court: Gives you 42?

Mr. Mahone: Yes, sir, 42 cents as his regular pay per hour.

The Court: Then he would be entitled to 42 times 44.

Mr. Mahone: That is right.

The Court: Which is $18.48.

Mr. Mahone: That is what I make it.

The Court: Then he would be entitled to 21 times——

Mr. Mahone: 63.

The Court: That comes to $13.23.

Mr. Mahone: Correct.

The Court: Which gives you a total of $31.71?

Mr. Mahone: Yes, sir.

The Court: Which would be some four dollars more than he gets.

[fol. 33] Mr. Mahone: On that particular basis.

The Court: That serves to illustrate the point.

Mr. Norris: It is urged in the Bill of Complaint that the plaintiff being employed at $27.50 a week the law automatically says that is for a 44-hour week and therefore for a 44-hour week you get the same salary of $27.50, and perhaps my brother can tell me what that figure is.

Mr. Mahone: It would be very much higher than this figure.

Mr. Norris: It gives us a rate per hour of 63½ cents.

Mr. Mahone: That is for the overtime.

Mr. Norris: That is for the basic 44 hour week and the overtime.

The Court: Let me see if I understand you. Let us take the same supposed average of 65 hours. You subtract 44 from it and we have left 21. The weekly rate is $27.50.

Mr. Norris: Divided by 44.

The Court: We divide that by 44 and that gives us 63 cents per hour. Then we multiply 63 by 44, is that right?

Mr. Norris: 63 by 44 gives you $27.50.

The Court: Then we multiply 63 by 1½ times.

Mr. Norris: Yes, sir.

The Court: And 1½ times 63 would be multiplied by 21.

Mr. Norris: That gives a time and a half rate of 94½ cents an hour, multiplied by 21 overtime hours.

The Court: Yes.

Mr. Norris: That gives $19.74 for the overtime and $27.50 for the straight time.

The Court: Yes.

Mr. Norris: Or, $47.24 a week.

The Court: That method raises it.

Mr. Mahone: Both methods raise it, the one more than the other.

[fol. 34] The Court: Don't those two methods illustrate your point of view?

Mr. Mahone: Yes.

The Court: Then I get back to the query I made before. If I could be sure your client had records which would show the hours for every week, so we could strike an average, then I would permit him to show those items. In fact, it would not be necessary for him to take the stand because counsel could do it in advance. But he has no records.

Mr. Mahone: Only the 30 weeks shown in the exhibit.

The Court: 30 weeks out of how many weeks that he worked?

Mr. Mahone: 103 or 104.

The Court: Then you have not over 30 per cent. What would the average for the 30 weeks be?

Mr. Mahone: It so happens the average for the 30 weeks is 65 hours. Your Honor selected 65. In those 30 weeks there were 1,957 hours, total hours worked, as shown by the exhibit. On the basis of the 30 weeks, I worked it out, and it shows $25 instead of $27.50.

The Court: Does the defendant refuse to accept those records as being accurate for the 30 weeks?

Mr. Norris: I do not see where that is shown to be the average of thirty weeks.

Mr. Mahone: It has not been shown. I added them up and divided.

Mr. Norris: Will you indulge me for just a moment?

The Court: Very well.

Mr. Norris: If your Honor please, that does bear out 100 per cent my brother's contention. We don't know and we are not prepared today to show whether plaintiff has shown here the records which reveal the greatest number

of hours. The records we have in our possession are much [fol. 35] nearer the maximum hours prescribed in the Act. They are not that figure, but much nearer that figure. I have not attempted to go into that because I did not think your Honor was interested in those figures today. But I think there is an argument that this is not an average, this is the high. It appears that when the man worked 80 hours he kept a record; and when he worked less than that he has no record.

The Court: Are you prepared to accept the figures as accurate for 30 weeks? If you are prepared to do that, and I do not see why you should not be, and if they were prepared by him, and he takes the stand and swears that is what he did work, and you have not got anything to refute that, I suppose that is the best evidence. If you are prepared to do that, then if the man also is prepared to make a statement that to the best of his knowledge and belief for the remaining weeks he worked so and so on an average, I will let that in the record. But I am not going to permit a whole lot of data to be offered that really is not the best evidence.

Mr. Norris: He has some sort of a record, I understand from his counsel that would substantiate an entry of 80 hours. We would want to know whether that included lunch time and supper time.

The Court: Why bother about 80 hours?

Mr. Norris: We have taken his top figure of 80 and was accepting it as correct for those two weeks. Still, you have no case. We certainly do not agree that on those figures of his without a very involved and lengthy cross-examination there is any accuracy to them for the purpose of establishing an hourly average per week.

The Court: You mean even for the period you stipulate?

Mr. Norris: Our stipulation only goes to the maximum number of hours in the one week.

[fol. 36] The Court: I understand. I am trying to shorten this matter. What is the objection, since neither side has full records, to the defendant admitting the records that we have of the plaintiff, if the defendant has not any better ones. And then, secondly, what is the objection to the defendant admitting the statements of the plaintiff that to the best of his knowledge and belief the average for the remaining weeks, 104 less 30, or 74, was, in his opinion, so and so, so many hours.

Mr. Norris: He has listed here 77 hours, and I would like first to see the memorandum that is in his possession. He says for the week ending September 15 he worked that many hours. If he has a memorandum we want to see the memorandum and want to see if the memorandum shows lunch time and supper time, or how does he keep that record. On our own time cards he has failed on some occasions to check in and out.

The Court: If he is put on the stand I will let you ask him how he arrived at those figures, but I am not going to allow you to take up each case. If he states that is the way he did it in every case that ought to be sufficient.

Mr. Norris: The burden of proof is on the plaintiff to establish his case. If he says, "I worked one week 77 hours", we have a right to cross-examine to find out if he is accurate for that week. If he says some other week he has worked 76 hours, we have a right to see the record and to cross-examine him, whether that reflects time off for lunch and supper. The contention of counsel presented this morning was to take the actual number of hours worked in a particular week. We can not find the actual number by an average; and the average for the first year of the Act would not apply to the average for the second year when we have a different rate of pay.

[fol. 37] Mr. Mahone: The word "actual" I do not find in the amended bill of complaint.

Mr. Norris: The second example you made to the Court this morning was to take a $25 salary per week and divide that by the actual hours worked that week.

Mr. Mahone: That was for the purpose of an illustrative calculation. The court stated exactly what we had in mind, to put the witness on the stand and have him testify as to what his recollection was as to the time he worked there for those periods other than that for which he has a record.

The Court: Gentlemen, I reach this conclusion. I will not allow any more testimony in this case, because I think we have sufficient figures both in the stipulation and in the hypothetical example that we can strike an average in order to enable the Court to arrive at a just decision on the law. Then it will be necessary on appeal to determine, if it can be determined, what were the actual hours worked per day, per week, by this plaintiff, and the matter will be referred to a master for the purpose of taking that testimony. Cer-

tainly, I am not going to take the time of this Court now in this hearing in order to get all of this spread on the record when I do not think it is necessary. If it should be necessary to determine it, it is a matter for the master to determine, if it can be determined, or for the parties subsequently to get together, after digging into these records, such as exist, and see if they can not arrive at some average.

Now, I will be very glad to hear argument from counsel.

[fol. 38] In District Court of the United States for the District of Maryland

[Title omitted]

Direction to Enter Judgment—Filed April 24, 1941

To the Clerk:

Enter judgment in the above-entitled case for the Defendant for costs.

William C. Coleman, U. S. District Judge.

Date: 24 April, 1941.

Docket Entry of Judgment

April 24, 1941. Judgment for the Defendant for costs, Order of Court filed.

[fol. 39] In District Court of the United States for the District of Maryland

Civil No. 901

William H. Missel, Plaintiff,

vs.

The Overnight Motor Transportation Company, Inc., a Body Corporate, Defendant

Opinion—Filed July 28, 1941

Coleman, District Judge:

This is a suit brought in reliance upon the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201 to 219, in-

clusive) by the plaintiff, an employee of the defendant, to recover additional wages or salary alleged to be due him, together with penalties, attorney's fee and costs.

It appears from the stipulation of facts filed in the case that the plaintiff was employed by the defendant, a common carrier of freight in interstate commerce by motor vehicle, as a rate clerk, his duties also embracing at times the receipt and disbursement of cash freight revenue, and the dispatching of defendant's trucks.

The period of employment here involved is approximately two years, from October 24, 1938, to October 19, 1940. Prior to November 1, 1938, plaintiff received a salary of $23.00 a week plus $2.50 per week allowance for supper money, or a total of $25.50; but from the latter date until October 19, 1940, when his employment with the defendant ceased, he received a salary of $25.00 per week plus the $2.50 allowance, or a total of $27.50 per week. It is conceded that the supper money allowance is properly to be treated as part of plaintiff's wages in interpreting his [fol. 40] rights under the Act. (Section 3 (m) 29 U. S. C. A. Sec. 203 (m)). His contract of employment is not evidenced by any writing. The company kept no record of the number of hours that plaintiff worked during the period here involved prior to June 14, 1940, since it had been decided by the District Court for the District of Columbia that employees such as the plaintiff were not subject to the provisions of the Fair Labor Standards Act, (American Trucking Associations v. United States, 31 F. Supp. 35), and the Supreme Court had not yet reversed this decision which it did on May 27, 1940. See United States v. American Trucking Associations, 310 U. S. 531. The plaintiff, however, did keep an account of the hours he worked for thirty weeks (not all consecutive) between September, 1939 and October, 1940, that is, for less than one-third of the total period of plaintiff's employment. This data shows that during this period of thirty weeks, plaintiff worked on an average of sixty-five hours a week. But it also appears that plaintiff was hired to work for no specific number of hours per day or week; that his periods of work varied greatly from day to day; that he regulated his on-duty hours according to his own judgment as to what was necessary; that his work weeks ended on Thursday; that he was paid his weekly salary regardless of absent time; that for at least two work weeks during the

period from October 24, 1938, to October 23, 1939, he was on duty as long as eighty hours, and that in at least three of the weeks during the period from October 23, 1939, until he left the Company, namely, October 19, 1940, he was on duty as much as seventy-five hours.

Since, as above explained, plaintiff has only a partial record of the hours he claims to have worked, he has submitted figures for only a portion of what he claims to be due him amounting to $604.90 but approximates the total at $1700.00. He also claims an additional amount as liquidated damages equal to such unpaid compensation as may [fol. 41] be found to be due him, making the total claimed as salary or wages approximately $3400.00, together with reasonable attorney's fee and costs of the action, relying upon the provisions of section 16 (b) of the Act (29 U. S. C. A. Sec. 216 (b)).

This case was previously before the Court on a motion of the defendant to dismiss the bill of complaint, on the ground that this Court had no jurisdiction to determine, in advance of a ruling by the Interstate Commerce Commission, whether the plaintiff is one whose activities affect the safety of operation of interstate motor vehicles, within the meaning of Sec. 13 (b) (1) of the Fair Labor Standards Act exempting employees with respect to whom the Commission has power to establish requirements concerning qualifications and maximum hours for service. This section is as follows: "The provisions of section 207 (fixing maximum hours of work) shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; * * *." 49 U. S. C. A. Sec. 304 (a) (1) and (2) which is part of the Motor Carrier Act of 1935, provides as follows: "Powers and duties generally. It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preserva- [fol. 42] tion of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

We overruled defendant's motion, since the above quoted exemption in Section 13 (b) (1) of the Fair Labor Standards Act embraces only those employees with respect to whom the Interstate Commerce Commission "has power" to establish requirements as to qualifications and maximum hours of service; since the Supreme Court, in United States v. American Trucking Associations, supra, limited such "power" to those employees "Whose activities affect the safety of operation"; and since plaintiff's activities cannot be said to "affect the safety of operation" because they have only a most remote relation to the actual movement of motor vehicles falling under the jurisdiction of the Interstate Commerce Commission. Missel v. Overnight Motor Transportation Co., 36 F. Sup. 980.

Following our disposition of the motion to dismiss the bill of complaint, the defendant answered and the case is now before us on its merits. American Trucking Associations, Inc. was permitted to intervene as amicus curiae, it being the national trade association of the trucking industry, and the defendant being one of its members.

The pertinent provisions of the Fair Labor Standards Act are the following: Sec. 6 (a) and (b): "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than [fol. 43] 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208.

* * * * * * *

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this chapter. * * *." (29 U. S. C. A. Sec. 206 (a) and (b)). Sec. 7 (a): "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *." (29 U. S. C. A. Sec. 207 (a).

It is conceded that at all times during the period of employment here in question both the $25.50 and the $27.50 weekly rate which plaintiff received was greater than the total minimum wages prescribed by the Act for the maximum hours for the work weeks as provided in the Act, plus [fol. 44] one and one-half times such minimum wages for all hours which he worked in excess of such stipulated maximum hours. Nevertheless, plaintiff contends that under the Act the amount of compensation due him by the terms of his employment by the defendant for all overtime must be determined by one and one-half times a rate found by dividing his weekly salary (1) by the number of hours actually worked per week; or (2) by the statutory work week hours. Plaintiff further asserts that since date is lacking with respect to the total number of hours in excess of the statutory maximums actually worked by him during most of the period in question, the Court should strike an average in applying the first of the aforegoing formulae.

In short, while plaintiff had agreed to work, and did work for almost two years after the Act became effective at the annual compensation of $1430. or $2860. for the two year period here in question, he now claims he should be paid retroactively $3400. additional,—in all, considerably more than double his agreed and accepted compensation.

As illustrative of the two methods of computation urged as alternates by the plaintiff, we will take sixty-five hours per week as the assumed average which plaintiff worked throughout the period in question, this being the average for the short period for which there are any records. Deducting from this the statutory maximum of forty-four hours, there is overtime of twenty-one hours. Sixty-five divided into the actual salary paid plaintiff, namely, $27.50, gives an hourly rate of 42½ cents, which, multiplied by forty-four hours, equals $18.70. Then, multiplying the overtime hours, namely, twenty-one, by one and one-half times this rate or 63¾ cents, we get $13.38¾ or a total of $32.08¾, that is to say $4.58¾ in excess of what the [fol. 45] plaintiff actually received. Similarly, to illustrate the second or alternate method urged by plaintiff for computing the amount of compensation due him, namely, dividing his weekly rate by the statutory hour maximum, namely, fourty-four, we obtain an hourly rate of 62½ cents, or 93¾ cents for the overtime rate for twenty-one hours, giving a total for overtime of $19.68¾ which, added to $27.50, gives a total of $47.18¾, or $19.68¾ per week in excess of what plaintiff has actually been paid.

The defendant Company, on the other hand, contends that since plaintiff was employed at a weekly salary to do a job rather than to work on a schedule of hours, because that job necessarily involved irregular, fluctuating periods of work per day, the sole effect of the Fair Labor Standards Act upon employment of this kind is to fix a floor, or minimum wage, below which it is not permissible to contract; that is to say, that an employer must pay the employee not less than 25 cents per work week comprising forty-four hours (taking the rate for the first year that the Act became effective), and not less than one and one-half times this minimum rate of 25 cents per hour for all hours worked in any one work week in excess of forty-four hours, but that the Act does not otherwise reform existing contracts or impair freedom to contract.

For example, defendant asserts that with respect to each of the two work weeks during the period from October 24, 1938, to October 23, 1939, that plaintiff claims he was on duty for eighty hours, for the purpose of determining whether the requirements of the Act have been satisfied, his minimum pay is to be determined by computing the wage for forty-four hours at 25 cents per hour or $11.00, and then by computing the wage for the additional hours, namely, [fol. 46] thirty-six, at 37½ cents per hour (one and one-half times 25 cents) or $13.50, making a total of $24.50, which is less than the weekly salary actually paid at all times during the period here involved.

In United States v. Darby, 312 U. S. 100, the Supreme Court sustained the constitutionality of the Fair Labor Standards Act of 1938, holding, in a suit directly involving the criminal provisions of the Act, that this legislation was within the commerce power and consistent with the Fifth and Tenth Amendments. It held that the wage and hour provisions of the Act do not violate the due process clause of the Fifth Amendment, saying, (page 125): "Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed." However, we find nothing in the decision in the Darby case which can be taken as an adjudication of the precise question now before this Court, which is not one of constitutionality, but of the interpretation and effect upon a contract of employment, such as that between the present plaintiff and defendant, of the provision of Section 7 of the Act prohibiting a longer work week than specified in that section, unless the employee is paid for overtime "at a rate not less than one and one-half times the regular rate at which he is employed." In other words, the question presented for decision here is: At what "regular rate" per hour, if any, within a proper interpretation of the words and meaning of the Act, was plaintiff employed?

It is significant that the Act contains no prohibition against or limitation upon working extra hours, and no prohibition against or limitation upon the making of agreements by employers with employees. It is clear that the underlying purpose of the Act is to establish and gradually [fol. 47] to raise minimum wages; that the overtime provisions in it were not inserted in order to discourage or

limit overtime work, but merely as an essential part of a plan to raise sub-standard wages by providing definite pay for overtime work when such may be required, and that there is nothing in the Act which purports to impair the right of employer and employee to contract in a manner not inconsistent with this basic scheme. As the Supreme Court said in United States v. Darby, supra, (pages 109-110): "The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in section 2 (a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess. Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees', appointed by him."

What, then, is the correct interpretation to be given to [fol. 48] the phrase "regular rate at which he is employed", as used in the proviso of Section 7 (a) of the Act when applied to employment such as that in which the plaintiff was engaged? At first blush, it may be said that these words are not ambiguous; that wherever weekly salaries are paid, no matter how freely and voluntarily agreed to, the "regular rate" referred to in the statute must invariably be determined, as plaintiff here contends, by dividing the actual weekly compensation by either the total number of hours the employee actually works during each work week, or by

the statutory number of hours to which the statutory minimum wage applies for the particular period, and then multiplying the number of overtime hours by one and one-half times the rate obtained by one or the other of these methods. The Supreme Court said in United States v. American Trucking Associations, Inc., supra, (page 543): "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation." But, as the Supreme Court went on to say, (pages 543-4): "When that meaning has let to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' The interpretation to the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty [fol. 49] requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. *Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'*" (Italics inserted).

We conclude that to give to the words, "the regular rate at which he is employed", the strictly literal interpretation for which plaintiff contends, would produce an unreasonable result at variance with what we understand to

[fol. 50] be the basic principle of the Fair Labor Standards Act. It is to be noted that there is no suggestion in the present case of any attempt on the part of the employer, the defendant, to evade the requirements of the Act. On the contrary, the facts as stipulated disclose that after the Act became effective, plaintiff's wages were increased, although, as herein before explained, what plaintiff had previously been paid was in excess of the Act's minimum requirements. It is further to be noted that from the very nature of plaintiff's employment it would have been extremely difficult if not practically impossible to make a fair working agreement based on hours of work, in view of the great variation from day to day in the length of time that plaintiff might be required to work. In short, we conclude that the only "regular rate" at which plaintiff was employed was the weekly rate; and that since this rate did not afford less, but more, compensation to plaintiff than that afforded by applying the minimum rate stipulated in the Act to the stipulated maximum hours for a regular work week, and one and one-half times such minimum rate to the maximum overtime hours actually worked by plaintiff as disclosed by such records as are available, the Act has not been violated.

Unfortunately, no help with respect to this precise question is to be derived from the Committee hearings in Congress or from conference reports. Legislation which finally resulted in the passage of this particular Act was pending before Congress for two years or more. The House and the Senate each passed radically different bills. Conferees were appointed and according to the usual procedure, their efforts ultimately resulted in the drafting and passage of a composite compromise measure. We do, however, find the following in the Conference Report with reference to the Senate bill (Congressional Record, page 9251, June 14, 1938) "sec. 9. * * * and the policy is declared that orders relating to wages shall effect only those employees who need legislative protection and shall not interfere with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupation." [fol. 51] While plaintiff's position appears to be supported by the current ruling of the Administrator, Wage and Hour Division of the Department of Labor, who is charged with the administration of the Act, (See Interpretative Bulletin No. 4, 1940, Wage and Hour Manual, 95,

96), it is significant that a former Administrator apparently held a differe t view (Labor Relations Reporter of October 24, 1938; 3 W. H. R. 228); and as late as April 14, 1941, we find an opinion by an Assistant Solicitor of the Wage and Hour Division to the following effect, (4 W. H. R. 181): "The test is, does the employer hire the employee at a salary for a certain number of hours and does he, therefore, owe the employee additional compensation on a pro rata basis when that specified number of hours is exceeded; or can the employer successfully contend that the facts and circumstances of employment are such that the salary is the employee's regular compensation for all hours worked, no matter what the exact number of hours may be. * * * In summing up, we may state the rule as follows: Given an employee employed on a salary basis if is necessary to determine as a matter of fact how many hours of work per workweek the employer may exact from the employee in exchange for such salary. As we stated before, the answer to such question depends upon an examination and evaluation of all of the pertinent facts and circumstances in a given case. We have to know when an employee works 60 hours and receives a salary of $30 in a given workweek, whether or not that $30 is all the employer owes the employee as his regular compensation for a workweek of such length. A test such as the following may prove workable: Is the salaried employee hired to do a job rather than to work a schedule of hours? Does the job necessarily involve irregular or fluctuating hours per day or week? The questions taken together constitute a single test; one question is not complete in itself."

[fol. 52] In Remer v. Czaja,, 36 F. Sup. 629, this Court ruled that an employee whose wages were not reduced below the minimum requirements of the Fair Labor Standards Act, although his wage reduction occurred at the time when wages of fellow employees were increased to meet these minimum requirements, could not recover from his employer the amount of wages of which he was deprived by such reduction. While that decision did not involve the precise question here in issue but had to do with the interpretation to be placed on the last sentence of Section 18 of the Act (29 U. S. C. A. Sec. 218) which reads as follows: "No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or

justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter," the underlying principle which governed this Court in its decision in that case is the same which it is believe- must control here.

Our conclusion also finds support in at least two decisions of other District Courts: Reeves v. Howard County Refining Co., 33 F. Sup. 90, a decision of the District Court for the Northern District of Texas, and Fleming v. Belo, 36 F. Sup. 907, a decision by the same Court, which very recently has been affirmed by the Circuit Court of Appeals, Fifth Circuit. (Fleming, Administrator v. Belo Corp., 121 F. (2d) 207). In the Reeves case the wages of several employees of a refining company were involved. While the Court found that the minimum rates provided by the Act had not been met in all cases, in one instance where further compensation was denied, the Court said (page 91): "Considering the number of hours actually worked, this pay exceeds the minimum time and overtime provided by the Act, and therefore complied with the Act, and the [fol. 53] Court finds that C. C. Reeves is not entitled to recover anything from defendant, he having entered into a contract for a stipulated consideration which is in excess of the minimum wage fixed by law, and that he had a right to make such agreement, and having entered into such agreement, he is bound thereby."

In the A. H. Belo Corporation case, the appellate court, in affirming the decision of the lower Court, gave an elaborate review of the history and underlying purpose of the Fair Labor Standards Act. In that case, the employees had been hired by a newspaper publishing company which made with each of the employees involved a bona fide contract of employment, at a basic hourly rate of pay, providing for payment for overtime work at a rate of not less that one and one-half times such basic rate of pay, with a guaranty that the aggregate pay for regular and overtime work would amount each week to not less than a certain definite sum stated in the contract. There, the Administrator contended that instead of adopting as to each employee the regular hourly rate stipulated in his contract of employment as the overtime rate, which in all cases was more than one and one-half times the minimum rate required by the Act, there should have been adopted a rate arrived at by dividing the weekly salaries of each

employee by the total number of hours worked each week. The lower Court held, and this was affirmed, that nothing in the Act was intended to, or did prevent the employer from contracting with its employees at a rate at which each employee was to be employed so long as such rate was not below the minimum fixed by the Act, and so long as each employee was paid at least one and one-half times such rate for over time work each week.

After analyzing the words employed in the Act, the Appellate Court said (pages 212-215): "When we turn to the legislative history of the act, appellant stands no better. For there is no reference in the whole legislative [fol. 54] history to prohibiting agreements between employer and employee, as here, for all inclusive and regular weekly salaries, none whatever to the effect that it was intended that persons already paying more than the minimum wage the act provided, should be compelled to pay still more. The legislative history of the act, while showing as the legislative history of all new and controversial acts does some individual differences of opinion, adds up to showing, as to the overtime provisions, only what the act shows, that in broad outline the Congress intended that for overtime work, time and a half, the regular rate of pay at which each was employed, should be paid each employee. How that regular rate should be arrived at, when it was fixed above the minimum, was not, for all that appears in the briefs of the parties, and we have not otherwise had access to the debates or committee reports, dealt with in the debates on the bill, either in the original passage of it, or in amendments offered to it, except to say that wages above the minimum must be left to bargaining between employee and employer. When all is said and done, appellant comes in his argument to this point; that the law should be construed as he contends for, because in the opinion of the administrator, the law would better serve its purpose if it were drawn that way. Appellant overlooks the fact that a legislative act in the United States is not as in some countries, a mere general outline by a party or group in power, of the purposes it wishes to accomplish, to be expanded, implemented and given effect by its administrators, in accordance with the general purposes of its proponents. A fundamental fact in American political life, has always been that in the struggle here for laws as means, to make law as liberator effective, there have always been differing

opinions as to the wisdom, propriety and scope of proposed new and controversial laws, and that laws as finally enacted [fol. 55] here, are usually the result of a compromise or at least of an adjustment of these conflicting views.

* * * * * * *

"Freedom of contract, within constitutionally valid limitations, is, in the United States of America, one of the fundamental freedoms and this particularly so in regard to labor relations. When, then, it is contended as here, that a statute has cut off or limited this freedom, a litigant, must point to something more than his opinion that it ought to be cut off or limited, must point to language clearly and validly so providing. There is no more authoritative principle in the field of labor law than that, subject of course, to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and work conditions are the proper subject of contract between employer and employee and their agreements must be, and are, given full effect in the courts.

"Here it is undisputed and found by the Court, that, desiring to maintain and continue a system of fixed and regular weekly salaries in strict and full compliance with the Fair Labor Standards Act, employer and employees freely and voluntarily entered into agreements having that effect. These agreements: fixed the regular rate of pay at which each was employed, at a figure considerably above the minimum standard wage the statute fixes; provided for a weekly compensation large enough to pay at least one and one-half times that regular rate for any overtime which he might be required to work each week; and based upon experience over the years, guaranteed a weekly salary to each employee in an amount which would, in some weeks be more, in none less than would be due them, at that rate, for the regular and the overtime hours worked in any week.

* * * * * * *

"Whether Congress could constitutionally fix a minimum wage and then compel employers wishing to provide for [fol. 56] fixed weekly salaries, to pay a wage higher than the minimum so fixed, might raise a serious constitutional question. That question is not before us, for nothing in

the act purports to make this requirement of an employer. Appellant does not so contend. His contention, stripped of all irrelevancies and confusions, really comes down, under the controlling law, to a contention of fact; that the testimony of the employer and its employees that they have agreed as they testified they did, is false; that there was no agreement; that there was mere bookkeeping to give the appearance of reality to an arrangement fictitious in fact, and a fraud upon the act. But in what the fiction or the fraud consists, except that the agreement is not in accord with appellant's views as to the purpose of the act, is not made to appear. It may be that Congress could validly, and should have written a provision into the law forbidding contracts such as those made here, but that is a question for Congress, not for the administrator or the courts. It certainly was not the question the employer and employee were confronted with when they made their agreements. That was not the question the district judge dealt with. It is not the question with which we have to deal. All the district judge was asked to and did decide, was whether the parties made the agreement they claimed to have made and whether they could, in law make such an agreement. We think it perfectly clear that the findings that they could and did, is supported in fact and in law, and that the judgment should be affirmed."

We are not unmindful of the fact that in the Texas decision from which we have just quoted, the contract of employment embraced a stipulation that expressly covered payment for overtime, whereas in the present case, there was no such express stipulation. Further, we are not unmindful of the fact that on this point the Circuit Court of Appeals in the Texas case said by way of dictum (page 211): "In cases where there is no express agreement as to the regular rate at which the employee is employed, [fol. 57] but only an agreement for a weekly wage, appellant's method of arriving at the regular rate by assuming that the wage stipulated for is not intended to cover overtime worked, would, we think, be unexceptionable. But in cases where, as here, the contract of employment fixes the regular rate, that method will not do, for here within the very words of the statute, 'the regular rate at which he is employed', is fixed as to each employee in his contract of employment." However, we do not think that,

on principle, there is any real distinction between the two situations. Each contract was followed in good faith in an attempt to meet the requirements of the law. In the Texas case, the Administrator sought the adoption of the same method for computing overtime wages that the plaintiff here seeks. That method was rejected in the Texas case because the parties were found to have entered into an agreement which, when given full expression as intended by the parties, satisfied the requirements, when fairly interpreted, of the Act. The same we find to be true in the present case.

It is asserted that the result of the interpretation which we here place upon the Act will lay the way open to its evasion by stressing the weekly or monthly character of work and wages or salaries paid; that it will permit employers to defeat the overtime provisions of the Act as to all employees except those whose wages are near the minimum level; that by making overtime more costly, it was intend to *a*pread employment opportunities and thereby to enforce, in effect, a flat prohibition without causing undue hardship to enterprises not readily adaptible to a shorter hour schedule, and that such purpose cannot be accomplished if the overtime provisions of the Act are restricted to those workers who happen to be at the minimum wage level.

In reply to such arguments, we deem it sufficient to say, first that each case must be decided upon its own special facts—we are not here attempting to do more than to [fol. 58] determine the rights of the present plaintiff with respect to his particular work period in question; and second, that this Court will never assume that an employer is attempting to evade the Act merely because his interpretation of it is inconsistent with his employee receiving more wages, such as he might receive under some other interpretation, particularly if such other interpretation has no more substantial support than a form of administrative fiat springing from a desire on the part of the administrative tribunal to produce abstract uniformity in its rulings, regardless of whether it is entirely reasonable so to do.

Accepting, as we may, the propostion that generally speaking the words "the regular rate at which he is employed" as used in the Act, mean the actual hourly rate of pay of the employee computed by dividing his actual weekly wage by the number of hours *customarily* worked,

there is the added reason for not applying that rule in the present case because plaintiff himself, who asserts it, as well as his employer, is unable to state the number of hours that he did work, except for a very limited period, and there was not, and could not be from the inherent character of the work *any customary* number. It might be another thing if the defendant in the present case failed to keep a record of the hours for the express purpose of evading the Act. Enough has already been said to indicate that the present defendant had no such purpose. See where the plaintiff's argument would lead us if uniformity were insisted upon without regard to peculiar facts in individual cases. Let us suppose a case where there is a regular hourly rate of employment which is below the minimum stipulated in the Act. Obviously, in such a case neither the employee nor the Wage and Hour Division would assert that such rate was "the regular rate" at which the employee was employed, for the purpose of determining the amount of wages for overtime. Such a case would be declared a [fol. 59] clear exception to the rule because, by direct implication, there can be no "regular rate" which does not meet the minimum requirements of the Act. So the result is reached by applying a rule of reason to words in their application to a particular case in order to produce a sensible result, which is just what this Court has attempted to do in the present instance.

Contrary decisions appear to have been reached in Fleming v. Carleton Screw Products Co., 37 F. Sup. 754, a decision of the District Court for the District of Minnesota, Fourth Division, and in St. John v. Brown, 38 F. Sup. 385, a decision of the District Court for the Northern District of Texas. The basis, however, of the decision in the first case was that the contested "agreed rate" was found to be merely a device for evading the provisions of the Act, and was not the rate at which the employee was actually employed. The second case involved the wages of ordinary oil field workers; and while general statements occur in the opinion indicating, prima facie, that the conclusion is contra to that here reached, a careful examination of the opinion discloses that, unlike the situation in the A. H. Belo Corporation case, supra, and here, the plaintiff was not at all times being paid as much or more than the minimum statutory rate when applied to both regular and overtime hours.

Finally, and to summarize: We find that the defendant has met the requirements of the Act in this particular case, when fairly interpreted, and that it would be inequitable to permit the plaintiff, through a strained construction of the Act, to recover, retroactively for two years, wages more than 100% in excess of what he voluntarily agreed to accept, and did accept during that period, not to speak of an additional 100% in penalties which he claims.

In view of our conclusion, it becomes unnecessary to consider any of the other points asserted by the defendant by way of defense. For the reasons given, judgment is entered for the defendant, costs to be paid by the plaintiff.

William C. Coleman.

[fol. 60] In United States District Court

[Title omitted]

Notice of Appeal—Filed July 19, 1941

Mr. Clerk:

Notice is hereby given that William H. Missel, Plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the final judgment entered in this action on April 24, 1941.

William O. Tydings, George A. Mahone, Attorneys for Appellant, William H. Missel, 649 Title Building, Baltimore, Maryland.

[fol. 61] In United States District Court

[Title omitted]

Petition of Plaintiff for Permission to Prosecute Appeal in Forma Pauperis and Order of Court Granting Petition—Filed July 22, 1941

Comes now the Plaintiff, by his Attorneys, and respectfully shows unto this Honorable Court as follows:

1—That Plaintiff heretofore sued the Defendant for unpaid overtime compensation, and liquidated damages,

pursuant to Section 16 (B) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chapter 676, 52 stat.; U. S. C. Title 29, Section 201 et seq.) generally referred to as the Wage and Hour Act.

2—On April 24, 1941, the Court rendered judgment for the Defendant.

3—Plaintiff wishes to take an appeal to the Circuit Court of Appeals, from the decision of the District Court, but because of his poverty he is unable to pay the costs incident to such an appeal or to give security for the same, and that Plaintiff believes he is entitled to the redress he seeks in such appeal.

4—There is attached to this Petition, and made a part thereof, a statement under oath in writing by Plaintiff, as required by U. S. C., Title 28, Section 832.

5—Wherefore, Plaintiff asks that this Court pass an Order permitting Plaintiff to prosecute his appeal In Forma Pauperis as prayed.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

[fol. 62] STATE OF MARYLAND,
City of Baltimore, ss:

Be it remembered, and I hereby certify, that on this 17" day of July, 1941, before me, the subscriber, a Notary Public duly appointed, commissioned and qualified, in and for the State of Maryland, City of Baltimore, aforesaid, and having authority by law to administer oaths therein, personally appeared William H. Missel and made oath in due form of law that he is Plaintiff, and The Overnight Motor Transportation Company, Inc., a body corporate Inc., is Defendant, in the District Court of the United States for the District of Maryland, Civil Action No. 901, in an action under Section 16 (b) of the Fair Labor Standards Act of 1938. That on April 24, 1941, the Court rendered judgment for the Defendant. That in accordance with the provisions of U. S. C., Title 28, Section 832, the said William H. Missel wishes to prosecute an appeal, but because of his poverty he is unable to pay the costs of said appeal or to give security for same, and that he believes he is entitled to the redress he seeks in such appeal. Said William H. Missel deposes that he is married, has 2 children, and his

weekly wage of $40.00 is sufficient only for the maintenance of himself and his family.

William H. Missel.

Sworn and subscribed to before me the day and year first above written. Angela G. Brown, Notary Public. (Seal.)

[fol. 63] ORDER

Upon the foregoing Petition and Affidavit, it is this 22nd day of July, 1941, by the District Court of the United States for the District of Maryland

Ordered:

That permission be and the same is hereby granted to prosecute said Appeal In Forma Pauperis, as prayed.

William C. Coleman, United States District Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO EXTEND THE TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION AND ORDER OF COURT GRANTING MOTION—Filed August 14, 1941

Comes now the Plaintiff, by his Attorneys, and respectfully moves the Court, under Rule 73 (g) of the Rules of Civil Procedure for the District Courts of the United States, to grant an extension of twenty days of time for filing the record on appeal and docketing the action, and assigns as reason therefor the following, to wit:

1—Final judgment for the Defendant was given by the Court on April 24th, 1941.

2—Notice of Appeal was filed with the Clerk of this Court on July 19th, 1941.

3—The written Opinion of the Court was filed July 28th, 1941, and because of its exhaustiveness will require extended study by Counsel.

4—The forty days, from the date of the Notice of Appeal, under Rule 73 (g) expires August 27th, 1941, and which time is felt to be insufficient.

Wherefore, your Petitioner prays that an Order be passed granting an extension of twenty days from the expiration of the forty days from the date of the Notice of Appeal in this cause.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

[fol. 65] ORDER

Ordered, this 14th day of August, 1941, by the District Court of the United States, for the District of Maryland, that the time for filing the record on appeal with the appellate court and there being docketed be, and the same is hereby extended, as prayed, for a period of twenty days from the expiration of the forty days from the date of the Notice of Appeal in this cause.

William C. Coleman, United States District Judge.

[fol. 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND DESIGNATION OF RECORD ON APPEAL—Filed September 3, 1941

As provided by rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States, it is hereby stipulated and agreed by Counsel for the Parties hereto that the Clerk of the Court will prepare the Record on Appeal in the above-entitled cause and include therein the following:

1—Bill of Complaint.

2—Defendant's Motion to Dismiss Bill of Complaint.

3—Opinion of Court overruling Motion to Dismiss.

4—Answer of Defendant to Bill of Complaint.

5—Motion of American Trucking Association, Inc., for leave to intervene Amicus Curiae, and Order granting such leave.

6—Stipulations of Facts filed by parties hereto.

7—Motion of Plaintiff and Order of Court granting leave to amend Bill of Complaint herein.

8—Order of Court granting Judgment for Defendant.

9—Plaintiff's Notice of Appeal to United States Circuit Court of Appeals.

10—Petition of Plaintiff and Order of Court granting permission to prosecute appeal in forma pauperis.

[fol. 67] 10½—Opinion of Court.

11—Petition of Plaintiff and Order of Court granting extension of time for filing record and docketing same in the Court of Appeals.

12—Court Stenographer's transcript of "Extract From Discussion".

13—This Stipulation and Designation of Record.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff. John R. Norris, J. Ninien Beall, Clayton W. Daneker, Attorneys for Defendant. J. Ninian Beall, John R. Norris, Attorneys for Intervenor.

[fol. 68] In United States District Court

Memorandum of the Clerk

1. Notice of Appeal filed 19 July, 1941.

2. Petition of Plaintiff and Order of Court granting permission to prosecute appeal in Forma Pauperis filed 22nd July, 1941.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 69] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4867

WILLIAM H. MISSEL, Appellant,

versus

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

September 19, 1941, the transcript of record is filed and the cause docketed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR PERMISSION TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed September 19, 1941

To the Honorable, the Judges of Said Court:

Comes now the Plaintiff, by his Attorneys, and respectfully shows unto this Honorable Court as follows:

1. That Plaintiff, in the District Court of the United States for the District of Maryland, sued the Defendant for unpaid overtime compensation, and liquidated damages, pursuant to Section 16 (B) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Chapter 676, 52 Stat.; U. S. C. Title 29, Section 201 et seq.) general- referred to as the Wage and Hour Act.

2. On April 24, 1941, the United States District Court for the District of Maryland rendered judgment for the Defendant.

3. Plaintiff wishes to take an appeal to this Circuit Court of Appeals, from the decision of the said District Court, but because of his poverty he is unable to pay the costs incident to such an appeal or to give security for the same, and that Plaintiff believes he is entitled to the redress he [fol. 70] seeks in such appeal.

4. There is attached to this Petition, and made a part thereof, a statement under oath in writing by Plaintiff, as required by U. S. C. Title 28, Section 832.

5. Wherefore, Plaintiff asks that this Court pass an Order permitting Plaintiff to prosecute his appeal in Forma Pauperis as prayed.

William O. Tydings, George A. Mahone, Attorneys for Plaintiff.

STATE OF MARYLAND,
City of Baltimore, ss:

Be It Remembered, and I hereby certify that on this 17" day of July, 1941, before me, the subscriber, a Notary Public duly appointed, commissioned and qualified, in and for the State of Maryland, City of Baltimore, aforesaid, and having authority by law to administer oaths therein, personally appeared William H. Missel and made oath in due form of law that he is Plaintiff, and The Overnight Motor Transportation Company, Inc., a body corporate Inc., is Defendant, in the District Court of the United States for the District of Maryland, Civil Action No. 901, in an action under Section 16 (b) of the Fair Labor Standards Act of 1938. That on April 24, 1941, the Court rendered judgment for the Defendant. That in accordance with the provisions of U. S. C., Title 28, Section 832, the said William H. Missel wishes to prosecute an appeal, but because of his poverty he is unable to pay the costs of said appeal or to give security for same, and that he believes he is entitled to the redress he seeks in such appeal. Said William H. Missel deposes that he is married, has 2 children, and his weekly [fol. 71] wage of $40.00 is sufficient only for the maintenance of himself and his family.

William H. Missel.

Sworn and subscribed to before me the day and year first above written. Angela G. Brown, Notary Public. (Seal of Notary.)

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER PERMITTING APPELLANT TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed September 19, 1941

Upon the Affidavit and Petition of the appellant, and for good cause shown,

It Is Ordered By The Court that the appellant in the above-entitled cause be, and he is hereby, permitted to prosecute his appeal in this Court *in forma pauperis*, and that he file six typewritten copies of his brief and appendix instead of twenty-five printed copies as required by the rules.

John J. Parker, Senior Circuit Judge.

September 18, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL RE APPEARANCES

September 23, 1941, the appearance of William O. Tydings and George A. Mahone is entered for the appellant.

September 29, 1941, the appearance of John R. Norris, Clayton W. Daneker and J. Ninian Beall is entered for the appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF AMERICAN TRUCKING ASSOCIATIONS, INC., TO INTERVENE AS "AMICUS CURIAE"—Filed October 6, 1941

American Trucking Associations, Inc., moves for leave to intervene as Amicus Curiae in the Appeal in this action, in order to assert the defenses to be set forth in a Brief to [fol. 72] be filed, and with oral argument thereof, before this Honorable Court, the ground for said intervention being that the American Trucking Associations, Inc. is the national trade association of the trucking industry, the members of which are vitally affected by the issues involved in said cause in which the decision will establish an important precedent.

And Whereas, it is the duty of the applicant for intervention to protect the interests of its members in litigation matters of national importance in which precedents may be established, and said Association has heretofore been the active party in all prior proceedings before the Congressional Committees, Interstate Commerce Commission, United States District Court (31 Federal Supplement 35)

and United States Supreme Court (310 U. S. 534; rehearing denied 61 S. Ct. 53).

And Whereas, the applicant for intervention prayed and was granted leave to intervene as Amicus Curiae in this action before the District Court of the United States for the District of Maryland,

And Whereas, the applicant for intervention actively participated in the trial of this case before said District Court of the United States for the District of Maryland,

Now, Therefore, comes the applicant for intervention and prays this Honorable Court to grant its motion for leave to intervene as "Amicus Curiae" to file a Brief and present oral argument herein.

J. Ninian Beall, Attorney for American Trucking Associations, Inc., 1424 16th St., N. W., Washington, D. C. John R. Norris, 1513 Fidelity Bldg., Baltimore, Md.

[fol. 73] In United States Circuit Court of Appeals

Consents of Parties to Intervention of American Trucking Associations, Inc.

William H. Missel by William O. Tydings and George A. Mahone, his attorneys, consents to the intervention of American Trucking Associations, Inc., as "Amicus Curiae".

William O. Tydings, George A. Mahone, Attorneys for Appellant.

Overnight Motor Transportation Co., Inc., a body corporate, consents by its attorneys, John R. Norris, J. Ninian Beall and Clayton W. Daneker; to the intervention of American Trucking Associations, Inc., as "Amicus Curiae".

John R. Norris, J. Ninian Beall, Clayton W. Daneker, Attorneys for Appellee.

In United States Circuit Court of Appeals

Order Granting Leave to American Trucking Associations, Inc., to File Brief as Amicus Curiae—Filed and Entered October 6, 1941

Upon the Motion of the American Trucking Associations, Inc., by its counsel, J. Ninian Beall and John R. Norris,

Esqs., and the consent of counsel for the respective parties in the above entitled case,

Leave is hereby granted the said American Trucking Associations, Inc., to file a brief as *amicus curiae* in this case.

John J. Parker, Senior Circuit Judge.

October 6th, 1941.

October 17, 1941, brief and appendix on behalf of the appellant are filed.

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, FOR LEAVE TO FILE A BRIEF AND PRESENT ORAL ARGUMENT AS AMICUS CURIAE—Filed October 17, 1941

Philip B. Fleming, Administrator of the Wage and Hour Division, United States Department of Labor, by his undersigned attorneys, respectfully moves this Court for leave to file a brief of more than fifty printed pages in length, but not to exceed 80 pages, and to present oral argument as *amicus curiae* in the above-entitled cause on the question involved in this appeal as to the proper interpretation and application of Section 7 of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, Sec. 201 *et seq.*).

1. The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of administering and enforcing the Act, and the appeal in this case presents questions which are of public interest and importance.

2. Section 7 (a) of the Act provides that no employer shall employ any of his employees who are engaged in interstate commerce or in the production of goods for interstate commerce for a workweek longer than that specified therein "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Appellant, as plaintiff, asserted a claim in the alternative according to two distinctly different interpretations of Sec-

tion 7(a); appellee, as defendant, asserted as a defense to plaintiff's claim a third distinctly different interpretation of Section 7(a). The court below based its judgment for de-
[fol. 75] fendant upon the interpretation advocated by defendant. The Administrator is of the opinion that the interpretation of Section 7(a) by the court below is erroneous, and that one of plaintiff's alternative interpretations is correct, namely, that "regular rate" as used in Section 7(a) means the hourly rate arrived at by dividing plaintiff's weekly salary by the number of hours he actually worked in each workweek. This interpretation has been advocated by the Administrator and sustained by federal district courts in numerous cases. To date it has been passed upon by only one United States Circuit Court of Appeals, namely, in *Fleming* v. *A. H. Belo Corp.*, 121 F. (2d) 207 (C. C. A. 5th), wherein a statement in the opinion of that court appears to have sustained the Administrator's interpretation notwithstanding the court denied its application in that case because of facts and circumstances which do not appear to be involved in the case at bar. In the *Belo* case a petition for certiorari has been filed in the Supreme Court of the United States.

In the administration and enforcement of the Act by the Administrator the question of the interpretation of Section 7 and the meaning of "regular rate" arises more frequently than any other single question. Every case involving Section 7 of the Act necessarily turns on the meaning of "regular rate at which he is employed." Accordingly, the interpretation and application of Section 7(a) by this Court, in the above-entitled cause, is of vital interest to the public, and to the Administrator in the discharge of his responsibility and duty of administering and enforcing the Act.

[fol. 76] Irving J. Levy, Acting Solicitor of Labor; John E. Skilling, Supervising Attorney; Beverly R. Worrell, Regional Attorney, United States Department of Labor, Attorneys for Philip B. Fleming, Administrator of the Wage and Hour Division.

Service acknowledged and motion consented to:

George A. Mahone (of Counsel), Attorney for Appellant. John R. Norris (of Counsel), Attorney for Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING LEAVE TO PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, TO FILE BRIEF AS AMICUS CURIAE—Filed and Entered October 17, 1941

Upon the Application of Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, by John E. Skilling, Supervising Attorney, and Beverley R. Worrell, Regional Attorney, his attorneys, consented to by counsel for the appellant and appellee, and for good cause shown,

Leave is hereby granted the said Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, to file a brief not in excess of 80 printed pages, as amicus curiae, in the above entitled case.

John J. Parker, Senior Circuit Judge.

October 17, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL RE FILING BRIEFS AND APPENDIX

November 5, 1941, brief of American Trucking Associations, Inc., as *amicus curiae*, filed.

Same day, brief and appendix on behalf of the appellee are filed.

[fol. 77] November 11, 1941, brief of Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae*, filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

RECITAL RE ARGUMENT OF CAUSE

November 19, 1941, (November term, 1941) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 78] In United States Circuit Court of Appeals, Fourth Circuit

No. 4867

William H. Missel, Appellant,

versus

The Overnight Motor Transportation Company, Inc., a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

(Argued November 19, 1941. Decided January 5, 1942)

Before Parker, Soper and Dobie, Circuit Judges.

George A. Mahone (William O. Tydings on brief) for Appellant; John R. Norris and J. Ninian Beall (Clayton W. Daneker on brief) for Appellee; John E. Skilling, of Counsel for Administrator of the Wage and Hour Division, U. S. Department of Labor, (Warner W. Gardner, Solicitor, Irving J. Levy, Assistant Solicitor, Beverly R. Worrell, Regional Attorney, and Jacob D. Hyman, of Counsel for Administrator of the Wage and Hour Division, U. S. Department of Labor, on brief) as *amicus curiae*, and J. Ninian Beall and John R. Norris on brief of American Trucking Association, Inc., as *amicus curiae*.

Opinion—Filed January 5, 1942

[fol. 79] Dobie, Circuit Judge:

This is an appeal from a final judgment of the District Court of the United States for the District of Maryland entered for the defendant in an action brought by appellant, as plaintiff, to recover from appellee, defendant, unpaid overtime compensation alleged to be due under Section 7(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060-1069 (1938), 29 U. S. C. A. §§201-219 (Supp. 1939) (hereinafter referred to as the Act), and an additional amount as liquidated damages, together with reasonable attorney's fees and costs of the action, as provided in Section 16(b) of the Act. The opinion of the District Court is reported in 40 F. Supp. 174. The case presents the problem of computation of overtime pay under the Act. Since this in turn presents questions of interpretation and rights and liabilities under the Act which are of considerable public interest and importance,[1] the Admin-

istrator, pursuant to leave granted by this Court, was permitted to submit a brief as *amicus curiae*, and to argue the case before this Court through counsel, confining his discussion to questions of interpretation of the Act involved in this appeal.

The case was tried on the complaint, answer, amendment to the complaint, and stipulation of facts by the parties. Accordingly, we adopt the statement of facts set out in the brief for the Administrator. Defendant admitted the following facts: that the court below had jurisdiction over the parties and the subject matter; that the defendant was licensed to engage, and was engaged, in the business of motor transportation of freight in interstate commerce and had employed plaintiff in that business; that all duties performed by plaintiff for defendant were "in commerce"; [fol. 80] that none of the duties performed by plaintiff was that of a driver, driver's helper, loader, or mechanic, as defined by the Interstate Commerce Commission in its decision of March 4, 1941, in *Ex Parte* MC-2 and MC-3; rather his duties were those of a rate clerk, cashier, and dispatcher; and that defendant kept no records of hours worked by plaintiff prior to June 14, 1940.

The parties agreed that plaintiff began to work for defendant on November 26, 1937, at a salary of $23 per week, plus supper money of $2.50 per week, and that after November 1, 1938, he worked for a salary of $25 per week, plus supper money of $2.50 per week, and that he worked a varying number of hours per workweek from the time his employment began, prior to the effective date of the Act, until his employment terminated on October 19, 1940. It was further agreed that in at least two workweeks during the period from October 24, 1938, to October 23, 1939, plaintiff was on duty 80 hours; that in at least three workweeks during the period from October 24, 1939, to October 19, 1940, plaintiff was on duty 75 hours. The issues raised by the pleadings as to hours worked in other workweeks were not tried or adjudicated. Plaintiff's offer of testi-

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[1] It is estimated that the eventual outcome of this case will have a powerful impact and profound effect on many million "white-collar" workers getting more than the statutory minimum wage. See Magazine of Modern Industry, Oct. 15, 1941, p. 42. If the decision of the lower court stands, the Wage-Hour division contends it will largely eliminate the law's benefits for them.

mony was rejected by the court as unnecessary for adjudication of the controlling legal question raised by the facts agreed upon.

Plaintiff argued, in the alternative, that his regular rate of pay is to be determined either by dividing the number of hours worked each workweek into his weekly wage, or by dividing the applicable statutory maximum hours (44 or 42) into the weekly wage. Defendant contended that plaintiff was employed at a weekly salary to do a job which necessarily involved irregular hours rather than to work a fixed schedule of hours, and, therefore, the sole effect of the Act was to fix a minimum wage for all hours worked and overtime compensation at time and one-half the statutory minimum rate per hour for hours worked in excess of the statutory maximum. It was admitted by the [fol. 81] parties that the contract of employment was not evidenced by any writing; that plaintiff was hired to work for no specific number of hours per day or week and that these hours varied greatly from day to day.

The court below found that the plaintiff's weekly wage (plus supper money) was more than the total minimum wages prescribed by the Act plus one and one-half times such minimum rate for the overtime hours actually worked by the plaintiff, and that defendant, accordingly, had not violated the Act. The court held that the overtime provisions of the Act were primarily minimum wage provisions, and were therefore satisfied if an employee was paid at time and one-half the statutory minimum rate for each overtime hour. The court's opinion is predicated on the premise that the purpose of the Act is to establish and gradually raise minimum wages, and that the overtime provisions were inserted, not to discourage or limit overtime work, but merely as part of a plan to raise substandard wages by providing definite pay for overtime work.

The pertinent section of the Act, which is the crux of this case, is Section 7(a), 52 Stat. 1063 (1938), 29 U. S. C. §207(a) (Supp. 1939).[2] Section 7(a), dealing with maximum hours, provides:

[fol. 82] "No employer shall, except as otherwise provided in this section, employ any one of his employees who

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[2] The minimum wage Section of the Act is Section 6(a), 52 Stat. 1062 (1938), 29 U.S.C. §206(a) (Supp. 1939) which provides: "Every employer shall pay to each of his em-

is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate *not less than one and one-half times the regular rate at which he is employed.*" (Italics added.)

In their oral argument before this Court, counsel for the plaintiff and counsel for the Administrator contended that Section 7(a) is primarily a maximum hours provision and hence an employer must pay one and one-half times the *actual wage* the employee is receiving for overtime. On the other hand, counsel for the defendant argued, in line with the reasoning of the lower court, that Section 7(a) is primarily a minimum wage provision and hence an employer is entitled to pay one and one-half times the statutory *minimum wage* for overtime. Thus, the important question presented on this appeal is whether "regular rate" as used in Section 7(a) means the hourly rate ar-

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ployees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour. . . ."

Both Sections 6 and 7 became effective October 24, 1938. The flat statutory minimum of 40 cents becomes effective June 25, 1945. "A minimum wage of 40 cents will yield an annual income of $800 a year to those continually employed for 50 weeks. No fair-minded person would suggest that this amount is too much to maintain the minimum American standard of living." H. R. Rep. No. 1452, 75th Cong., 1st Sess. (1937) 9. See also H. R. Rep. No. 2738 (Conference Report), 75th Cong. 3rd Sess. (1938) 28.

rived at by dividing plaintiff's actual weekly wage by the number of hours actually worked in each workweek,[3] or whether it means the statutory minimum rate. This, of course, raises the broad question as to what the real purpose of Section 7(a) of the Act is.

[fol. 83] We are unable to agree with the lower court that the primary purposes of the Fair Labor Standards Act are satisfied by the payment of time and one-half the statutory minimum wage for overtime. Furthermore, we do not believe that Section 7(a) is merely part of a broad scheme of minimum wage regulation.[4]

Purpose of Section 7(a) of the Fair Labor Standards Act

Every statute born of economic and social pressure, attempting to harmonize discordant socio-economic forces, must be viewed in the framework of conditions aimed to be remedied thereby. Consequently, it is vital that the Congressional findings and declaration of policy set forth in the Act be examined with care. The findings of Congress, as set forth in Section 2(a), are that the existence in industries engaged in commerce of substandard labor conditions do not conduce to the maintenance of minimal health,

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[3] No authority has been found for plaintiff's alternative contention that regular rate of pay is to be computed by dividing the applicable statutory maximum hours (44 or 42) into the weekly wage. Accordingly, we reject this contention.

[4] Federal control over wages, hours, and working conditions is exerted under other measures besides the Fair Labor Standards Act. The Walsh-Healey (Public Contracts) Act, 49 Stat. 2036 (1936), 41 U. S. C. §35 (Supp. 1939), requires sellers of goods in excess of $10,000 to the United States to pay minimum wages determined by the Secretary of Labor, to observe the eight-hour day and forty-hour week, and to abstain from use of child and convict labor. The Bacon-Davis Act, 46 Stat. 1494 (1931), 40 U. S. C. §276 (a) (1934), authorized the Secretary of Labor to establish minimum wages for employees constructing public buildings of the United States. Prior statutes had established the eight-hour day for such laborers. 37 Stat. 137 (1912), 40 U. S. C. §324 (1934). The Merchant Marine Act, 49 Stat. 1992 (1936) as amended 52 Stat. 954 (1938), 46 U. S. C. §1131 (Supp. 1939), authorizes

living, and general welfare standards of workers employed therein; that the free flow of commerce is burdened thereby; that unfair competition, labor disputes and disorderly marketing result. The declaration of policy is unequivocally set out in Section 2(b) where it is declared to be the policy [fol. 84] of Congress in the exercise of its commerce power to correct and eliminate these burdensome conditions without substantial impairment of employment or earning power. As was stated by the Chief Justice of the United States: "* * * the motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." See *United States* v. *Darby Lumber Co.*, 312 U. S. 100. The objectives of the Act, as expressed, demonstrate that the Act, comprehensive in its purpose and remedial in character, should be liberally construed. See *Bowie* v. *Gonzales*, 117 F. (2d) 11, 16; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56; *Fleming* v. *A. B. Kirschbaum Co.*, 38 F. Supp. 204, 206. Only in this way can the coordination of our economic life and the elimination of unfair differentials in labor conditions be effectively achieved.[5]

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the Maritime Commission to fix minimum wages and working conditions for all officers and crews employed on vessels receiving "an operating differential subsidy". The Sugar Act of 1937, 50 Stat. 909 (1937), 7 U. S. C. §1131 (Supp. 1939), authorizes the Secretary of Agriculture to condition benefit payments upon compliance with statutory regulations of child labor, and with wage rates determined by the Secretary to be fair and reasonable.

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[5] Proponents of wage and hour legislation contend that these laws do not necessarily raise production cost and selling price. It seems to be the consensus of opinion, however, that the tendency of such laws is to increase the cost to the consumer. See Douglas, Economic Theory of Wage Regulation (1938) 5 U. of Chi. L. Rev. 184. "The fixation of wages has been justified by the administration and its supporters on three grounds, namely, that: (1) it was necessary to protect workers from the pressure of com-

The President's message to Congress of May 24, 1937,[6] [fol. 85] asserted the necessity for governmental control over maximum hours, minimum wages, the evil of child labor and the exploitation of unorganized labor. In that message, he expressed the hope that the right of the government to change working hours would decrease unemployment in those groups in which unemployment principally existed.[7] It seems plain from the legislative history of the Act[8] that, in addition to attempting to establish a decent national level of working conditions,[9] one of the fundamental purposes of the Act was to induce worksharing and

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petition, or from the combination in wage matters of monopoly; (2) it was desirable to check downward spirals of wage-cutting with an attendant demoralization of market prices and a proportionate increase in the relative weight of fixed charges; (3) an increase in wage rates would, it was alleged, increase the total quantity of effective purchasing power, and hence increase the demand for mass production goods and services." See Douglas and Hackman, The Fair Labor Standards Act of 1938 I (1938) 53 Pol. Sci. Quar. 491. It is, of course, not the Court's function to approve or disapprove the economic wisdom of Congressional findings. See Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 245, where Congressional findings of an economic nature were accepted by the Supreme Court.

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[6] H. R. Rep. No. 1452, 75th. Cong., 1st. Sess. (1937) 5. See Sen. Rep. 884, 75th. Cong., 1st. Sess. (1937) 1.

[7] H. Doc. 255, 75th. Cong., 1st. Sess. (1937) 4.

[8] On admissibility and the relative weight to be assigned to committee reports, hearings, debates, etc., see Jones, Statutory Doubts and Legislative Intent (1940) 40 Colum. L. Rev. 957; Jones, Extrinsic Aids in the Federal Courts (1940) 25 Iowa L. Rev. 737; Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes (1939) 25 Wash. U. L. Q. 2.

[9] See 81 Cong. Rec. 7652, 7793 (1937); Sen. Rep. No. 884, 75th. Cong., 1st. Sess. (1937) 1, 3, 4; H. R. Rep. No. 1452, 75th. Cong., 1st. Sess. (1937) 9. See also Douglas and Hackman, The Fair Labor Standards Act of 1938: I 53 Pol. Sci. Quar. 491.

relieve unemployment by reducing hours of work.[10] In *Williams* v. *General Mills*, 39 F. Supp. 849, 952, the court said:

"The evil was not so much in the length of time men worked but with nine, ten, or twelve million unemployed in this country, the problem was to cut into that unemployment without financially hurting industry or its employees. It was hoped to cut at least four or five million from the unemployment ranks. This it appears was the big objective of the Wages and Hour and Fair Labor Standards Act."

That the overtime provisions of the Act are aimed at re-employment and designed for economic and social purposes, as well as to protect the health or welfare of the employees, seems obvious from the omission of any absolute limitation upon weekly hours of work if properly com- [fol. 86] pensated, and the absence of any limitation upon daily hours.[11]

Not only may an employee be worked twenty-four hours per day; but one hundred and twenty-four hours of overtime per week would not violate the law so long as the employee was paid for all such overtime at the required rate. "'The Act is not, as the company contends, merely a wage statute.'" *Sunshine Mining Co.* v. *Carver.*, 4 Wage Hour Rept. 480, 481 (D. Ohio). Of course the argument for shorter hours is partly justified on the grounds of the added satisfaction which the workers would obtain, but one of the primary purposes was to make it possible for more workers to be added to the payroll.[12] One of the impelling forces behind the Act is the effort to promote eco-

[10] H. R. Rep. No. 1452, 75th. Cong., 1st. Sess. (1937) 9, 14. See Cooper, The Coverage of the Fair Labor Standards Act and Other Problems in its Interpretation (1939) 6 Law & Contemp. Problems 350, 352; Cooper, "Extra Time for Overtime" Now Law (1938) 37 Mich. L. Rev. 28, 31; Note (1939) 52 Harv. L. Rev. 646, 665, 677.

[11] See Chart Showing State and Federal Hour Limitation (1938) U. S. Dept. of Labor (test of true hour law is a limitation on both daily and weekly hours of work). See (1939) 2 Wage Hour Rept. 5, for A. F. of L. criticism of absence of daily limitation. Cf. Wilson v. New, 234 U. S. 322.

[12] See Douglas and Haekman, The Fair Labor Standards Act of 1938: I (1938) 53 Pol. Sci. Quar. 491.

nomic stability through increased purchasing power.[13] These purposes of the Act are accomplished because the overtime provisions of the Act, requiring employers to pay an extra bonus or penalty for such work, distinctly tend to discourage overtime. This is on the theory that the overtime rate established by the Act will be sufficiently expensive to compel employment of new men, and that employers rather than pay overtime will spread employment.[14]

A great majority of the courts have recognized that Section 7(a) of the Act plainly imposes a requirement which [fol. 87] tends to discourage long hours of labor and that Congress intended[15] it to have just that effect. Otherwise, employers would be permitted to defeat the overtime provisions of the Act as to all employees save those whose wage was near the minimum level. In *St. John* v. *Brown*, 38 F. Supp. 385, 390, the Court said:

"The 'one and one-half times' provision is akin to a penalty, intended to discourage overtime employment and to encourage a greater spread of employment. It must be remembered that Section 6 is a minimum wages Act, and Section 7 is a maximum hours Act; that they are really two Acts in the same bill."

In *Dubois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541, 542 (C. A. Ohio), the Court said:

"Work for a greater number of hours is incompatible with the general welfare and must be discouraged by requiring the employer to pay at the higher rate for all time in excess of the maximum."

[13] See Joint Hearings before the Committee on Education and Labor, U. S. Senate, and the Committee on Labor, House of Representatives, on S. 2475 and H. R. 7200, 75 Cong., 3rd. Sess. (1937) 93, 237, 307, 334, 597, 646, 918, 1079, 1117. See also H. R. Rep. No. 1452, 75th Cong., 1st. Sess. (1937) 9. See Herman, The Administration and Enforcement of the Fair Labor Standards Act (1939) 6 Law & Contemp. Problems 372.

[14] See Cooper, "Extra Time for Overtime" Now Law (1938) 37 Mich. L. Rev. 28, 31.

[15] For a good discussion of "Congressional intent" see Radin, Statutory Interpretation (1930) 43 Harv. L. Rev. 863; Landis, A Note on Statutory Interpretation (1930) 43 Harv. L. Rev. 886.

Similarly in *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 [16], the Court said (at p. 758):

"Section 7 does not purport to regulate wages but imposes a penalty on overtime work, regardless of what the rate of pay may be, thus making overtime work more costly to the employer and creating more employment by limiting the hours of labor."

See also *Williams* v. *General Mills*, 39 F. Supp. 849, 851; *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *Drake* v. *Hirsh*, 40 F. Supp. 290; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300; *Abroe* v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. (Minn. Sup. Ct.); [fol. 88] *Haddad* v. *Beckerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (M. D. Ga.); *Wilkerson* v. *Swift & Co.*, 4 Wage Hour Rept. 305 (N. D. Tex.); [17] *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.); *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 329 (Super. Ct. Ind., Allen Co.); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn., Ramsey Co.)[18]; *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. (E. D. Okla.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co.); *McLenden* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex.); *Graves* v. *Armstrong Creamery Co.*, 10 U. S. L. Week 2320 (Sup. Ct. Kan.).

Furthermore, we think it is not without significance that the Supreme Court of the United States in sustaining the constitutionality of Section 7(a) in *United States* v. *Darby Lumber Co.*, 312 U. S. 100, relied heavily on prior cases dealing with maximum hour statutes. The Supreme Court in the Darby case said:

"Nor is it any longer open to question that it is within the legislative power to fix maximum hours, *Holden* v. *Hardy*, 169 U. S. 366; *Muller* v. *Oregon*, 208 U. S. 412."

[16] Now on appeal to the Circuit Court of Appeals for the Eighth Circuit.

[17] Now on appeal to the Circuit Court of Appeals for the Fifth Circuit.

[18] Now on appeal to the Supreme Court of Minnesota.

That Section 7(a) was designed to regulate hours of work is not only implicit in the *Darby* opinion, but by its separate discussion of Sections 6 and 7 and its reliance upon prior maximum hour decisions, the Supreme Court seems already to have given its imprimatur to the "maximum hour" interpretation which we here adopt.[19]

[fol. 89] Certain it is that the Wage and Hour Division considers Section 7(a) was directly aimed at a regulation of hours. As stated by Administrator Elmer F. Andrews in picturesque language, the primary purposes of the Act are to fix a floor for wages, a ceiling for hours, and a break for children.[20] The interpretation urged upon the Wage and Hour Division was that the overtime provisions of the Act applied only to employees paid the basic minimum wage rate and that the Act essentially was only a "poor man's" minimum wage law.[21] This interpretation was re-

[19] Subsequently, in *Olsen* v. *Nebraska*, 313 U. S. 236, the Supreme Court said (at p. 245): "And at this term we upheld the minimum wage and *maximum hours provisions* of the Fair Labor Standards Act of 1938. *United States* v. *Darby*, 312 U. S. 100." (Italics supplied.)

[20] See 3 Fed. Bar Ass. Jour. 333. It is likewise indisputable that the popular designation of the Fair Labor Standards Act has always been that of a *Wages* and *Hours* Act.

[21] Of the thirty-six and a half million workers gainfully employed in the United States it has been estimated that eleven million fall within the protection of the Act. See *Interim Report of the Wage and Hour Division*—Aug. 15th. to Dec. 31st, 1938, U. S. Dept. of Labor, I—10B. The Report at page 10 gives the following statistics on the economic coverage of the Act and number of employees affected:

No. of employees covered by the Act—11,000,000

No. of employees receiving less than 25c per hour—300,000

No. of employees receiving less than 30c per hour—350,000

No. of employees receiving less than 40c per hour—1,418,000

No. of employees working more than 44 hours weekly—1,384,000

No. of employees working more than 42 hours weekly—1,751,000

No. of employees working more than 40 hours weekly—2,184,000

jected, and the official interpretation is that the overtime provisions of the Act extend to all employees whatever may be the wage paid.[22] A similar interpretation was urged upon this Court, and we reject it too. Since the overtime provisions of the Act were designed to spread employment opportunities by making overtime more costly, it is obvious that this purpose cannot be achieved if the overtime provisions are to be restricted to those workers at the minimum wage level. A vast majority of the courts have recognized in consequence that the Act does apply to employers paying in excess of the minimum wages prescribed in the Act. E. g., *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. [fol. 90] 754; *St. John* v. *Brown*, 38 F. Supp. 385; *Allen* v. *Moe*, 39 F. Supp. 5; *Drake* v. *Hirsch*, 40 F. Supp. 290; *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *DuBois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. Ohio), affirming *Floyd* v. *DuBois Soap Co.*, 4 Wage Hour Rept. 77 (C. P. Hamilton Co., Ohio); *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.).

We are not unmindful of the fact that several courts have rejected the "maximum hour" interpretation of Section 7(a) which we here adopt and are wedded to a "minimum wage" theory of that Section. See *Fleming* v. *A. H. Belo Corp.*, 121 F. (2d) 207 (C. C. A. 5th, 1941), *cert. granted*, 10 U. S. L. Week 3137; *A. H. Belo Corp.* v. *Street*, 36 F. Supp. 907; *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90; *Bumpus* v. *Continental Baking Co.*, No. 211, W. D. Tenn., April 29, 1941[23]; *Fleming* v. *Atlantic*, 40 F. Supp. 654; *Fleming* v. *Stone*, 4 Wage Hour Rept. 560 (N. D. Ill.); *Gurtov* v. *Volk*, 170 Misc. 322, 11 N. Y. S. (2d) 604 (Munic. Ct. N. Y. 1939). In the *Belo* case, the Court said (at pp. 211 and 212):

"Section 7, the section in question, does not at all fix maximum hours. * * * The purpose of the Act is to establish and gradually raise minimum wages, *the overtime provisions in it are inserted not at all to discourage or limit*

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[22] Interpretative Bulletin No. 14, 1940 Wage & Hour Man. 95.

[23] Reversed by the Circuit Court of Appeals for the Sixth Circuit, Dec. 10, 1941.

*overtime but as a part of the scheme to raise substandard wages. * * *.*" (Italics ours.)

We are unable to agree with the Circuit Court of Appeals for the Fifth Circuit that the overtime provisions of the Act are merely part of a scheme to raise substandard wages. Rather we conclude that the purpose of Section 7(a) is to eliminate long hours of labor by requiring employers to pay extra compensation for overtime work. Otherwise the guarantees of the Act become "only a prom-[fol. 91] ise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[24]

Meaning of "Regular Rate" as Used in Section 7(a)

As we have already indicated, the court below adopted a "minimum wage" theory of Section 7(a) and consequently concluded that the overtime provisions of the Act are satisfied by the payment of one and one-half time- the statutory minimum rate for each overtime hour—"regular rate" and "minimum rate" becoming synonymous. This interpretation makes the overtime provisions of the Act effective only as to employees in the lowest wage brackets. Since we have adopted a "maximum hour" interpretation of Section 7(a), it follows as the night the day that we must reach a different conclusion. We think it is clear that "regular rate" of pay means the *actual* rate of pay which the employee is receiving no matter how high, and not the minimum rate set forth in the statute.[25]

"In no other way could the coercive effect of the provision for one and one-half times the regular rate for overtime be brought into operation as clearly intended by Congress." *DuBois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. Ohio).

Congress must have had in mind the fact that many employees who were within the policy of the Act would receive wages in excess of the minimum and hence it is

[24] Quoted from Mr. Justice Jackson in *Edwards* v. *California*, 10 U. S. L. Week 4037, 4041 (U. S. 1941).

[25] Thus, an employer paying $24 for a 48-hour week is not complying with the statute simply because the employees receive the equivalent of 25 cents an hour and 37½ cents for each hour in excess of 44. The employees must be paid 50 cents for the first 44 hours and 75 cents for the last four, a total of $25.

difficult to see how the objective of discouraging excessive overtime can be accomplished if "regular rate" is to be construed as meaning "minimum rate". Such a construction would wholly defeat this policy, for if an employee was getting a fairly high wage, one and one-half times the [fol. 92] minimum would in such a case be less than the actual wage the employee was receiving per week in the normal course of his employment. This would encourage rather than discourage overtime, and the plain purpose of Congress—*viz.* to deter employers from working their employees overtime—would be frustrated. Such a mischievous fallacy we cannot permit. As was said by the Court in *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754 (at p. 757): "It seems that the construction contended for by defendant to the effect that employer and employee may agree on a regular rate of pay regardless of what compensation the employee actually receives, will permit employers to avoid the obligations imposed by Section 7 and will completely nullify the overtime provisions therein contained." It seems clear that the benefits of the Act were intended to apply to a wider group than those employed at the statutory minimum and therefore the Act ought not to be construed to exclude them from its principal benefits.

Numerous other factors seem to support the conclusion which we have here reached. First, the words of Section 7(a)—to-wit: *"regular rate at which he is employed"*—tend to indicate that it is the actual wage of the particular employee involved rather than the general minimum; otherwise the underscored words would be superfluous if not meaningless. We do not believe the words can be interpreted to mean the minimum required by the Act because the plain language, we think, is not subject to that interpretation when read in its ordinary meaning. Normally the best evidence of Congressional purpose is the language of the law itself.[26] In *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329: (C. P. Berks Co., Pa.), the Court said:

"Nor can it successfully be maintained that by regular rate is intended "minimum rate". If Congress had in-

[26] "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assn.*, 310 U. S. 534, 543.

[fol. 93] tended the overtime to be paid at one and one-half times the "minimum" legal rate, it could have said so very aptly by using the word 'minimum' instead of the word 'regular'. The fact that it did not do so is a plain indication that it did not so intend."

Similarly, in *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.), the Court said:

"By the language of the statute, therefore, the one and one-half pay for overtime is one and one-half times the rate at which the particular employee is employed, whatever that may be."

Secondly, Section 18 of the Act, 52 Stat. 1060 (1938), 29 U. S. C. § 218 (Supp. 1939), reinforces the opinions just expressed as to what Congress intended by the words "regular rate" of pay as used in Section 7(a). Section 18 of the Act provides that:

"No provision of this Act shall justify any employer in reducing a *wage paid by him* which is in excess of the applicable minimum wage under this Act. * * *" (Italics supplied.)

By enacting Section 18, Congress intended primarily to discourage the possible tendency that the minimum wage fixed in the Act would become the maximum wage paid by employers. In declaring that no provision of the Act shall justify a reduction of wages, one of the aims of the Act is to prevent lowering of existing rates when they exceed the minimum. Thus, if overtime is to be computed at the minimum rate instead of the "wage paid by him", this obviously tends to reduce the existing wage within the meaning of this Section. If the rate is variable at the whim of the employer, the hour provisions of the Act have no effective sanctions. Section 7(a) and Section 18 must be read together, and a comparison of these two sections points to the conclusion which we have reached.

[fol. 94] Thirdly, both the interpretative bulletins [27] issued

[27] "The Act is clear that it is the employee's regular rate of pay on which time and one-half is based and not any minimum wage set in the Act." See Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 96. In answering ques-

by the Wage and Hour Division and regulations [28] have interpreted "regular rate at which he is employed" to mean the actual rate the employee is receiving and not the statutory minimum. Although such interpretations are by no means binding on the courts, we consider them highly significant. See *United States* v. *American Trucking Assn.*, 310 U. S. 534, 549 [29]; *Jacobs* v. *Peavy Wilson Lumber Co.*, 33 F. Supp. 206, 212; *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40.

Fourthly, the vast majority of the courts have construed "regular rate" of pay to mean the actual pay which the employee is receiving, expressly denying that "regular rate" is synonymous with "minimum rate". *Fleming* v.

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tions at a meeting of the Southern States Industrial Council on Sept. 29, 1938, in Birmingham, Ala., Administrator Andrews first stated that a worker employed on a flat weekly salary might be worked more than 44 hours a week, without increased pay, provided his total earnings were not below the minimum requirements of the law. See 3 Wage Hour Rept. 228. This impromptu remark was quickly retracted and subsequent statements and bulletins from the Administrator are all to the opposite effect. See, e. g., Interpretative Bulletin No. 4 issued on Oct. 21, 1938, before the Act became effective. The subject is discussed in an editorial in the New York Times of Tuesday, October 25, 1938.

[28] Regulations on Records § 516.4, 1940 Wage & Hour Man. 282. The regulation was cited with approval and followed in Emerson v. Mary Lincoln Candies, Inc., 175 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct.). See also Haddad v. Bedkerman Shoe Corp., 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.). In an address by the former General Counsel of the Wage and Hour Division, no mention was made of any possible ambiguity in "regular rate". See Magruder, Administrative Procedure under the Fair Labor Standards Act, 25 A. B. A. J. 688 (1939).

[29] In this case, the Supreme Court said that the Administrator's interpretation was entitled to great weight since it was a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Carleton Screw Products Co., 37 F. Supp. 754; *Fleming* v. [fol. 95] *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300; *Williams* v. *General Mills*, 39 F. Supp. 849; *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *St. John* v. *Brown*, 38 F. Supp. 385; *Drake* v. *Hirsch*, 40 F. Supp. 290; *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.); *Wilkenson v. Swift & Co.*, 4 Wage Hour Rept. 305 (N. D. Tex.); *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex.); *DuBois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. Ohio), affirming *Floyd* v. *DuBois Soap Co.*, 4 Wage Hour Rept. 77 (C. P. Hamilton Co., Ohio); *Thornberg* v. *Eastern T. & W. N. C. Motor Transportation Co.*, 3 Wage Hour Rept. 534 (Sup. Ct. Tenn.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (N. D. Ga.); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275; *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Moss* v. *Postal Telegraph Cable Co.*, 4 Wage Hour Rept. 221 (M. D. Ga.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich. Ingham Co.); *Graves* v. *Armstrong Creamery Co.*, 10 U. S. L. Week 2320 (Sup. Ct. Kan.). In *St. John* v. *Brown*, 38 F. Supp. 385, the Court said (at p. 389):

"The key to the right answer is the true per hour wage of the employee. That must be determined, of course, by reference to the actual employment contract. That amount, whatever it is, represents the true regular rate of pay for each of the hours worked in a week."

The Court also made this significant statement (at p. 389):

"It is not enough that the salaries here, independent of the working contract, may be allocated or spread so as to cover the minimum and one and a half for overtime. It may even exceed the 30 cent minimum and the 45 cents for overtime and yet be a violation of the law."

As we have indicated, those courts which adopt a "minimum wage" theory of Section 7(a) almost inevitably must reach a conclusion different from the conclusion that we have here reached. See *Fleming* v. *A. H. Belo Corp.*, 121 F. [fol. 96] (2d) 207 (C. C. A. 5th, 1941), *cert. granted*, 10 U. S. L. Week 3137; *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90; *Bumpus* v. *Continental Baking Co.*, No. 211, W. D. Tenn., April 29, 1941; *Gurtov* v. *Volk*, 170

Misc. 322, 11 N. Y. S. (2d) 604 (Munic. Ct. N. Y. 1939). Yet surprisingly enough, the Court in the *Belo* case, *supra*, used language which would indicate that the position we have taken is unassailable:

"In cases where there is no express agreement as to the regular rate at which the employee is employed, but only an agreement for a weekly wage, appellant's method of arriving at the regular rate by assuming that the wage stipulated for is not intended to cover overtime worked, would, we think, be unexceptional." *Fleming* v. *A. H. Belo Corp.*, 121 F. (2d) 207, 211.

To be sure, the facts in the *Belo* case are distinguishable from the case at bar. In that case, the plan of the *Dallas News* was to make individual contracts with its reporters guaranteeing them a weekly salary above the statutory minimum. The contract called for, a "basic hourly rate" exceeding the minimum wage prescribed by the Act, with overtime at the rate of one and one-half times this "basic hourly rate", and guaranteed to each employee a predetermined weekly wage. Thus, the formula called for one hourly rate up to forty hours, and a higher rate beyond that; but provided that the employees got the full amount whether or not they worked more than forty hours in any week. Salaries were not reduced, but neither was extra pay given for overtime. The Wage-Hour Division contended that overtime should be calculated on the actual weekly wage. The Court rejected this contention and upheld the wage-payment plan. The case differs from the case at bar because there was a contract for a weekly wage, and also for an hourly "regular rate" not less than the minimum on which overtime should be computed. We find no such written contract in the instant case, and there is no evidence in the record, nor any con-[fol. 97] tention by the defendant, that the parties had agreed upon a rate of pay per hour. That there are important grounds of distinction is admitted by the Court in the *Belo* case in the very language we have quoted. Furthermore, that same Court in a very recent decision, *Warren-Bradshaw Drilling Co.* v. *Hall*, decided Dec. 9, 1941, (10 U. S. Law Week 2368), expressly stated that the written agreement in the *Belo* case was determinative of the issue.

Method of Computation

Although the Act only establishes hourly wage standards, it has been uniformly interpreted as covering salaried workers as well as employees paid on an hourly basis. *E. g., St. John* v. *Brown*, 38 F. Supp. 385; *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300; *In re New Style Hat Mfg. Co., Bankrupt*, 4 Wage Hour Rept. 29 (N. D. Ohio); *Moss* v. *Postal Telegraph-Cable Co.*, 4 Wage Hour Rept. 291 (M. D. Ga.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich.); *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.); *Haddad* v. *Beckerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.). Otherwise the Act would be almost completely ineffective in reducing the actual hours worked per person, since the penalty for overtime would be purely nominal and in no sense real. In *Boylan* v. *Linden Mfg. Co., supra*, the Court stated this expressly (at p. 158):

"That the statute was intended by Congress to apply to employees receiving weekly or monthly wages is, I think, reasonably apparent from a consideration of all the provisions of the Act. * * * There would seem to be no satisfactory basis for limiting the scope of the statute to employees working solely on the basis of a specific hourly wage."

Similarly, the mere fact that a worker's hours of em- [fol. 98] ployment fluctuate does not insulate him from the protection of the overtime provisions of the Act. E. g., *St. John* v. *Brown*, 38 F. Supp. 385; *Abadie* v. *Cudahy Packing Co.*, 37 F. Supp. 164; *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich.). In *Boylan* v. *Linden Mfg. Co.*, the Court said (at p. 159):

"The record indicates that plaintiff worked a fluctuating number of hours per week during the period of his employment. *This means that the average hourly rate must be computed separately for each week* by dividing the sum of fifty dollars by the number of hours actually worked." (Italics supplied.)

In this connection it should be noticed that the word "regular" as used in the overtime compensation provisions

of the Act referring to the employee's "regular rate" of pay does not necessarily mean unvarying. In *Haddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co., Pa.) for example, it was argued that a person paid by the week has no "regular" hourly rate; that if in some weeks he works more than in others, his hourly rate would differ each week. This argument was summarily rejected and the Court said (at p. 329):

"We do not think the word 'regular' must necessarily and in all cases mean 'unvarying'. 'Regular' means, in the first place, in accordance with a *regula* or rule. It does not necessarily imply an unvarying sameness. It may mean normal, agreeable to established, customary forms * * * We think a fair interpretation of the word as used is that it means basic or actual hourly pay * * *"

If the employee's hours vary from week to week, the cost per week to his employer will vary accordingly. See *Wilson* v. *New*, 243 U. S. 332, 361-362. There is nothing in the Act which prevents the average hourly rate from being com-[fol. 99] puted separately each week. In fact, the Act contemplates *work-week* as the regular unit for computing the hourly rate.

The Wage and Hour Division has construed "regular rate" of pay to mean the actual hourly rate of pay, computed by dividing the actual weekly wage by the number of hours actually worked. Regulations on Records §516.4, 1940 Wage & Hour Man. 282; Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 96.[30] Where the employee works an irregular or fluctuating number of hours from week to week, his regular rate of pay is to be computed each week by dividing his weekly salary by the number of hours he worked that week. See Interpretative Bulletin No. 4, 1940 Wage & Hour Man. 95, 97. Similarly, a vast majority of the courts agree that the regular rate is to be computed on the basis of wages actually received each week divided by the number of hours worked each week.[31] *St.*

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[30] Similarly, piece work must be translated into hourly rates. See *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 329 (Sup. Ct. Ind.).

[31] Thus, an employee receiving $40 for a 50 hour week would be deemed to be paid at the rate of 80 cents an hour, and the courts require that his weekly wage be increased to $42.40 ($.80 x 44 plus $1.20 x 6).

John v. *Brown*, 38 F. Supp. 385; *Du Bois Soap Co.* v. *Floyd*, 4 Wage Hour Rept. 541 (C. A. 1941); *McLendon* v. *Bewley Mills*, 4 Wage Hour Rept. 30 (N. D. Tex.); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Sunshine Mining Co.* v. *Carver*, 4 Wage Hour Rept. 480 (D. Idaho); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Hoddad* v. *Bedkerman Shoe Corp.*, 4 Wage Hour Rept. 329 (C. P. Berks Co.); *Moss* v. *Postal-Telegraph-Cable Co.*, 4 Wage Hour Rept. 221 (M. D. Ga.); *Emerson* v. *Mary Lincoln Candies, Inc.*, 174 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct.); *Angel* v. *Dayton Veneer & Lumber Mills*, 4 Wage Hour Rept. 471 (N. D. Ga.); *Boylan* v. *Linden Mfg. Co.*, 4 Wage Hour Rept. 158 (C. C. Mich., Ingham Co.); *Graves* v. *Armstrong Creamery Co.*, 10 U. S. L. Week 2320 (Sup. Ct. Kan.). In *Hargrave* v. *Mid-*[fol. 100] *Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.), the Court said (at p. 353):—

"* * * their regular wage is to be computed upon the basis of the wages actually received each week divided by the number of hours worked each week. For that number of hours in excess of the maximum, plaintiffs are entitled to be compensated at the rate of one and a half times the regular rate.

"The plaintiffs have not received compensation for overtime at one and a half times their regular rate, but have been paid only at regular rates of pay for all hours they worked during the weeks in question, and each plaintiff is therefore entitled to an additional one-half of his regular rate for each hour of overtime in each of the weeks in question."

In an effort further to clarify the point, we present one example. Let us suppose an employee is employed at a salary of $30 for a workweek of indefinite length. For a week of 50 hours his regular rate of pay would be 60 cents per hour ($30÷50). The employee's total earnings for the week would be $33, computed as follows:

40 hours at 60 cents per hour (straight time)	$24.00
10 hours at 90 cents per hour (time and one-half)	9.00
	$33.00

The following week, his total earnings would be similarly computed and so on each week.

The Liquidated Damages Provision of the Act

One last point remains for our determination, and that involves the interpretation of Section 16(b) of the Act, 52 Stat. 1069 (1938), 29 U. S. C. § 216(b) (Supp. 1939). Section 16(b) provides:

[fol. 101] "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable * * * in the amount of * * * unpaid overtime compensation * * * and in an additional equal amount as liquidated damages."

Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts to be subjected to such a measure. Yet no matter how much we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it. *St. John* v. *Brown*, 38 F. Supp. 385; *Williams* v. *General Mills*, 39 F. Supp. 849; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275; *Thompson* v. *Daugherty*, 40 F. Supp. 279; *Emerson* v. *Mary Lincoln Candies, Inc.*, 174 Misc. 353, 20 N. Y. S. (2d) 570 (Sup. Ct.); *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90; *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742; *Lefevers* v. *General Export Iron & Metal Co.*, 36 F. Supp. 838; *Hargrave* v. *Mid-Continent Petroleum Corp.*, 4 Wage Hour Rept. 352 (E. D. Okla.); *Moss* v. *Postal Telegraph Co.*, 4 Wage Hour Rept. 291 (M. D. Ga.); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (D. Minn. Ramsey Co.); *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 392 (Sup. Ct. Ind.); *Roberts* v. *Hoarel*, 4 Labor Cases 60648; *Abroe* v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. 38 (Minn. Sup. Ct.).

The use of the word "wilful" in Section 16(a) defining criminal liability under the Act and its omission in Section 16(b) defining civil liability would seem to indicate that the employer's good faith is immaterial under Section 16(b). The only case we have been able to find which re-

fused to apply Section 16(b) in the case of a 'good faith violation of the Act is *Clour* v. *Jones*, 4 Wage Hour Rep. 353 (E. D. Okla.). While we are extremely sympathetic with the sentiments which prompted the Court to recoil [fols. 102-103] from a mandatory application of the Section in that case, we are unable to agree with the result. Such matters are for Congress and not for the courts. The views we have expressed throughout this opinion are in accord with those expressed by the Circuit Court of Appeals for the Sixth Circuit in the very recent decision of *Bumpus* v. *Continental Baking Co.*, decided Dec. 10, 1941, (10 U. S. Law Week 2369).

For the reasons set forth above, the decision of the lower court is reversed and the case remanded with directions to enter judgment for the plaintiff in accordance with this opinion.

Reversed and Remanded.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4867

WILLIAM H. MISSEL, Appellant,

vs.

THE OVERNIGHT MOTOR TRANSPORTATION COMPANY, INC., a Body Corporate, Appellee

JUDGMENT—Filed and Entered January 5, 1942

Appeal from the District Court of the United States for the District of Maryland

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Maryland, at Baltimore,

with directions to enter judgment for the plaintiff in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge.

January 5, 1942.

January 29, 1942, petition of appellee for a stay of the mandate is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING APPLICATION IN SUPREME COURT FOR A WRIT OF CERTIORARI—Filed January 31, 1942

Upon the Application of the Appellee, by its counsel, John R. Norris and J. Ninian Beall, and for good cause [fol. 105] shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said Appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

January 30, 1942.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPTS OF RECORDS IN MAKING UP RECORDS FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATIONS FOR WRITS OF CERTIORARI—January 9, 1941

For Reasons Appearing To The Court,

It Is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

John J. Parker, Senior Circuit Judge.

January 9th, 1941.

[fol. 106] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 107] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 16, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is assigned for argument immediately following No. 622.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8972)